TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~490.~~ 2058

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY K. WHITON, ADMINISTRATOR OF THE ESTATE OF MARY F. WHITON, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 11, 1870.

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1 Circuit court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law at the city of Milwaukee, in said district of Wisconsin, on the second Monday (being the eleventh day) of April, A. D. 1870—present and presiding, the Honorable Thomas Drummond, circuit judge and the Honorable Andrew G. Miller, district judge; Charles S. Hamilton, marshal; Edward Kurtz, clerk—among other the following proceedings were had, to wit:

HENRY K. WHITON, ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company.
} At law.

Be it remembered that heretofore, to wit, at a stated term of said court, begun and held according to law at the city of Milwaukee on the second Monday (being the fourteenth day) of September, A. D. 1868, and on the eighteenth day thereof, to wit, on the ninth day of November, A. D. 1868, the following proceedings were had, to wit:

Order docketing case.

HENRY K. WHITON, ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company.
} At law.

This day came the plaintiff and presented to the court copies of the process and proceedings in this case, certified from the circuit court for Jefferson County, within this district, and of the bond and order
2 of said court, for the removal of said cause to this court, according to law. Whereupon it is ordered by the court that the said certified copies be filed, and that the cause be entered on the law docket of this court, and be proceeded *in* in the same manner as if it had been commenced here by original process; which copies of process and proceedings are as follows, to wit:

Certified copies from State court.

STATE OF WISCONSIN, *County of Jefferson, ss:*

WHITON, ADM'R, &C.,
vs.
CHICAGO & NORTHWESTERN RAILWAY Company.

Office of the clerk of the circuit court for Jefferson County.

I do hereby certify that I have compared the *foregoing* copies of a

summons, complaint, demurrer, order sustaining demurrer, remittitur of supreme court of Wisconsin reversing order sustaining demurrer, answer, order changing place of trial of suit from Rock County to Jefferson County, and affidavit upon which such order was based; affidavit, petition, & bond for removal of suit for trial into the circuit court of the United States for the district court of Wisconsin, and order of the circuit court of Jefferson county thereon made, removing said suit for trial into the said circuit court of the United States; and of all endorsements thereupon, with the original records of the same remaining in this office, and the original papers now remaining on file in this office; and that the same are correct transcripts therefrom, and of the whole of said originals and original records.

In witness whereof I have caused the seal of said circuit court for Jefferson County to be hereunto affixed this 5th day of October, A. D. 1868.

[JEFF. CO. C. C. SEAL.] P. N. WATERBURY,
Clerk Circuit Court for Rock County.

The State of Wisconsin to The Chicago & Northwestern Railway Company, defendant:

3 You are hereby summoned to answer the complaint of Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, plaintiff, which will be filed in the office of the clerk of the circuit court for Rock County, at the city of Janesville, in said county, of which a copy is hereunto annexed and herewith served upon you; and to serve a copy of your answer on us at our office in the city of Janesville, Rock County, within twenty days after the service hereof, exclusive of the day of such service. And if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

CONGER & HAWES,
Pl'ff's Att'ys.

[U. S. internal revenue stamp, 50 cents, canceled.]

STATE OF WISCONSIN, *Rock County, ss:*

I hereby certify that, on the 5th day of October, A. D. 1866, at the city of Janesville, in said county, I personally served the annexed summons and complaint on the defendant, The Chicago and Northwestern Railway Company therein named, by delivering to and leaving with J. A. Heard, who is the station agent in the employ of said railway company in the city of Janesville, in said county, on the line of railroad owned and operated by said railway company, copies thereof; the general office of said defendant, The Chicago & Northwestern Railway Company, not being within said State of Wisconsin.

A. O. WINCHESTER,
Sheriff of Rock County.

Fees.

Service	1 00
Copy	1 60
Travel	20
	2 80

(Indorsed:) Original filed Oct. 11, 1866.

LEVI ALDEN, *Clerk.*

Filed Dec'r 6th, 1866.

LA FAYETTE KELLOGG,
Clerk S. C.

Circuit court, Rock County.

HENRY R. WHITON, ADMINISTRATOR OF THE ESTATE of Mary F. Whiton, deceased, plaintiff,
ag'st
THE CHICAGO & NORTHWESTERN RAILWAY Company, defendant.

4 Henry K. Whiton, administrator of Mary F. Whiton, deceased, plaintiff, for complaint in this action says that The Chicago & Northwestern Railway Company, the above-named defendant, is, & for more than four years last past has been, a railroad corporation within the State of Wisconsin, duly incorporated & organized, under & by virtue of the laws of said State, under the name of The Chicago & Northwestern Railway Company, & doing business as such corporation within said State under the aforesaid name; that the defendant is, & for more than four years last past has been, the owner & in the possession & use of the Chicago & Northwestern railway & road within said State, together with the track, cars, locomotives, engines, & all other fixtures & appurtenances thereunto belonging, &, as such owner, has, during all the time aforesaid, used, operated, & managed, & does now use, operate, & manage, the same; that a portion of the track & road of the defendant so owned, used, & operated, & managed as aforesaid, lies within the corporate limits of the city of Janesville, in said State, & did so lie within such limits during all the time aforesaid; that said city of Janesville is, & for more than four years last past has been, a duly incorporated city within said State, under & by virtue of the laws of said State, situated in the county of Rock, in said State; that, during all the time aforesaid, there has been, & now is, in said city, a lawful, public, travelled street, called Academy street, & known as such; that the aforesaid track of said defendant, as located & operated through said city, crosses said Academy street, & has so crossed the same & been operated & used across said street for more than four years last past.

And the plaintiff, upon information and belief, further says that, on the 23d day of December, 1864, the said Mary F. Whiton, then in full life & health, was walking along, in, & upon said Academy street in said city, where the same is crossed by said road track of the defendant, & so used & operated across the same as aforesaid, as she, the said Mary F., might rightfully and lawfully do, &, while so crossing said track in the street aforesaid, the said defendant, by its servants & em-
5 ployees then in charge of a locomotive engine attached to & propelling a tender & a car or cars of said defendant on said track, by the carelessness, negligence, unskillfulness, & culpable mismanagement of said defendant & its servants & employees, wrongfully ran said tender & locomotive engine & said car or cars upon & over the body of the said Mary F. at the place aforesaid, in said city and State, whereby she, the said Mary F., was mortally injured, so that she died of, & in consequence of, said injuries, & by reason thereof, within the space of seven weeks thereafter, in said city of Janesville, in the State aforesaid; that, at the time said Mary F. was so run over & injured as aforesaid, the said engine & cars were propelled upon & along said track across said street at an unlawful rate of speed, to wit, at a rate of speed of more than six miles an hour; & that, before crossing said

street, & while crossing the same at the time said engine & cars run over & injured said Mary F. as aforesaid, the defendant wrongfully neglected to cause the bell on said engine to be rung, and the same was not rung, before crossing said street or while crossing the same; that, at the time of the aforesaid injury, & while said engine & cars were propelled & run upon said track over & across said street as aforesaid, said defendant also carelessly & culpably neglected and omitted to give any warning or notice whatever of the approach of the same to said *track*, nor were any precautions whatever then & there taken or observed by said defendant or its servants & employees in running said engine & cars to avoid said injury or give notice of danger; but, on the contrary thereof, said defendant, by its aforesaid servants & employees, then & there so carelessly, negligently, & unskillfully managed & run said engine & cars that, through & by reason of the negligence of the defendant & its servants, & by their aforesaid wrongful*ly* acts, neglect, & default, the aforesaid injury to & death of the said Mary F. were caused and produced by said defendant as aforesaid; that, at the time the said Mary F. was so run over & injured as aforesaid, she was exercising proper & reasonable care & diligence to avoid said engine & cars & escape injury therefrom; but the said defendant, by its servants & employees,
6 so negligently & culpably mismanaged the said engine & cars, & the running of the same, that, by reason of such negligence & mismanagement, & without any fault or neglect on the part of the said Mary F., she, the said Mary F., was run over & killed as aforesaid; that the said Mary F. was the lawful, wedded wife of the said Henry K. Whiton, & that she died as aforesaid, in said city of Janesville, on the 7th day of February, 1865, intestate, leaving her said husband, the said Henry K. Whiton, her surviving, & that she also left two children her surviving, to wit, Arthur Lee Whiton, aged at that time eight years, & Henry King Whiton, then aged four years, who are the only issue of the said Mary F. & Henry K., & that the said Henry K. Whiton, Arthur Lee Whiton, & Henry King Whiton still survive; that, by reason of the death of the said Mary F., caused & occasioned as aforesaid, the said Henry K. has been deprived of her aid & assistance in his household affairs & in rearing their said children, & has otherwise been greatly injured, & has thereby sustained & suffered great loss, to his damage five thousand dollars; that on the 14th day of September, 1866, letters of administration upon the estate of the said Mary F. were duly issued & granted to the plaintiff by the county court for Rock County, whereby the said plaintiff was duly appointed administrator of all & singular the goods, chattels, rights, credits, & estate of the said deceased, the said Mary F. Whiton, & that he thereupon duly qualified as such administrator, & entered upon the discharge of the duties of said office, & is now such administrator.

Wherefore the plaintiff, as such administrator as aforesaid, demands judgment against the defendant for the aforesaid injuries, & damage in the sum of five thousand dollars, together with costs of this action.

CONGER & HAWES,
Pl'ff's Att'ys.

STATE OF ILLINOIS, *Cook County, ss:*

Henry K. Whiton, being duly sworn, says he is the plaintiff in
7 this action, & that the foregoing complaint is true, to his own knowledge, except as to those matters which are therein stated on information & belief, & as to those matters he believes it to be true.

HENRY K. WHITON.

Subscribed & sworn before me this 24th day of September, 1866.
J. A. SLEEPER,
Com'r for Wisconsin, residing in Chicago, Illinois.

Circuit court, Rock County.

HENRY K. WHITON, ADMINISTRATOR OF THE ESTATE of Mary F. Whiton, deceased, plaintiff,
against
THE CHICAGO AND NORTHWESTERN RAILWAY Company, defendant.

The above-named defendant demurs to the complaint of the above-named plaintiff in this action, and specifies the following grounds of demurrer:

First. The plaintiff has not legal capacity to sue, for that it appears by said complaint that this action is brought for an injury to the person, or for negligently causing the death of the plaintiff intestate, and in an action to which the plaintiff intestate could not have brought if living.

Second. There is a defect of parties plaintiff. If any cause of action is stated in said complaint, it is in favor of Henry K. Whiton as the husband of Mary F. Whiton, deceased, and is for the sole benefit and interest of said estate. The complaint shows that an action is sought to be maintained under sections 12 & 13 of chapter 135 of the revised statutes of Wisconsin, and it should have been brought in the name of Henry K. Whiton, in accordance with the requirements of such statutes.

Third. The complaint does not state facts sufficient to constitute a cause of action, for that it does not appear by said complaint that Mary F. Whiton, deceased, could have maintained an action for the injury charged, (if death had not ensued,) and recovered damages in
8 respect thereof, but, on the contrary thereof, shows that she could not have maintained an action for such injury, it appearing that she was a married woman, and had a husband living.

A. A. JACKSON &
WILLIAM RUGER,
Att'ys for Defendant.

(Indorsed:) Circuit court, Rock County. Henry K. Whiton, adm'r, against C. N. W. R. W. Co.
Filed December 3, 1866.
LEVI ALDEN, *Clerk.*

Filed Dec. 6th, 1866.
LA FAYETTE KELLOGG, *Clk.*

Circuit court, Rock County.

HENRY K. WHITON, ADMINISTRATOR, &C., OF Mary F. Whiton, plaintiff,
ag'st
THE CHICAGO AND NORTHWESTERN RAILWAY Company, defendants.

This action having been brought to trial on the issue of law joined herein, after hearing A. A. Jackson in support of the demurrer, & Conger & Hawes, opposition:

Ordered, That said demurrer be, and the same is, sustained, and that

the defendant have judgment thereon, but with leave to the plaintiff to amend his complaint within twenty days, on payment of ten dollars costs.

Dated December 4th, 1866.

By the court:

W'M P. LYON, *Judge.*

(Indorsed:) Circuit court, Rock Co. Henry K. Whiton, adm'r, &c., ag't The Chicago & Northwestern Railway Co. Order sustaining demurrer. Conger & Hawes, pla'n'ff att'ys.

Original filed Dec. 4, 1866.

LEVI ALDEN, *Clerk.*

9 Be it remembered that, at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the eighth day of January, A. D. 1867, on the forty-seventh day of the term, to wit, on the fifth day of March, A. D. 1867—present, the Hon. Luther S. Dixon, chief justice, and the Hon. Orasmus Cole, and the Hon. Jason Downer, associate justices of said court—the following proceedings were had inter alia, to wit:

HENRY K. WHITON, ADM'R, &C., APPELLANT,
vs.
THE CHICAGO & NORTHWESTERN R. R. Co., respondent.
} Appeal from circuit court, Rock County, State of Wisconsin.

This case came on to be heard on the appeal from the order of the circuit court of Rock County, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by the court that the order of the circuit court of Rock County sustaining the demurrer to the complaint in this cause be, and the same is hereby, reversed, with costs to be taxed against the said respondent, and that this cause be, and the same is, remanded to the said circuit court for such further proceedings therein as may be according to law.

STATE OF WISCONSIN, *Supreme Court, ss:*

I, La Fayette Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true copy of the order & judgment of the court in the above-entitled cause, as appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, this twenty-third day of March, A. D. 1867.

[SEAL.] LA FAYETTE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

(Indorsed:) No. 67. State of Wisconsin supreme court. Henry
10 K. Whiton, adm'r, &c., appellant, against The C. & N. W. R. R. Co., respondent. (Copy.)

Original received and filed March 29, 1867.

GEO. R. PECK, *Clerk.*

Circuit court, Rock County.

HENRY K. WHITON, ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

The defendant in this action, answering the complaint therein, admits that it is, and for more than four years last past has been, a railroad corporation within the State of Wisconsin, duly incorporated and organized under & by virtue of the laws of said State, under the name of The Chicago and Northwestern Railway Company, and doing business as such corporation, within said State, under the aforesaid name; that defendant is, and for more than four years last past has been, the owner and in possession and use of the Chicago and Northwestern railway and road, within said State, together with the track, cars, engines, and all other fixtures and appurtenances thereunto belonging, and as such owner has, during all the time aforesaid, used, operated, and managed, and does now use, operate, and manage, the same; that a portion of the track and road of the defendant so owned, used, operated, and managed as aforesaid lies within the corporate limits of the city of Janesville, in said State, and did so lie within such limits during all the time
11 aforesaid; that said city of Janesville is, & for more than four years last past has been, a duly incorporated city within said State, under and by virtue of the laws of said State, situate in the county of Rock, in said State; that, during all the time aforesaid, there has been, and now is, in said city, a lawful public traveled street, called Academy street, and known as such; that the aforesaid track of defendant, as located and operated through said city, crosses said street, and has so crossed the same, and been operated and used across said street, for more than four years last past; that the said Mary F. was the lawful, wedded wife of the said Henry K. Whiton, and that said Henry K. Whiton still survives.

And this defendant, further answering the said complaint, says that as to whether the said Mary F. Whiton died on the 7th day of February, 1865, intestate, or as to whether she left her surviving two children, to wit, Arthur Lee Whiton, aged at that time eight years, and Henry King Whiton, then aged four years, or whether such children are the only issue of the said Mary F. and Henry K. Whiton, or as to whether said Arthur Lee Whiton and Henry K. Whiton, or either of them, still survive, this defendant has no knowledge or information sufficient to form a belief. And defendant has no knowledge or information sufficient to form a belief as to whether, by reason of the death of the said Mary F. Whiton, the said Henry K. Whiton has been deprived of her aid and assistance in his household affairs or in rearing said children, or has been otherwise greatly or in any degree injured, or has thereby sustained or suffered great or any loss; or as to whether, on the 14th day of September, 1866, or at any other time, letters of administration on the estate of the said Mary F. Whiton were duly issued or granted to the plaintiff by the county court for Rock County, or issued or granted at all, or whether by such letters of administration or otherwise said plaintiff was duly, or in any manner, appointed administrator of
12 all and singular the goods, chattels, rights, credits, or estate of the said Mary F. Whiton; or as to whether he thereupon duly, or in any way, qualified as such administrator, or entered upon the dis-

charge of the duties of said office, or as to whether he is now such administrator.

And this defendant, further answering said complaint, upon information and belief denies each and every allegation therein contained not hereinbefore specifically admitted or answered by denial of any knowledge or information thereof sufficient to form a belief.

SECOND.

II. And, as a second and further answer to said complaint, this defendant, upon information and belief, alleges that The Milwaukee and Prairie du Chien Railway Company, on the 23d day of December, 1864, was, and for many years prior thereto had been, a corporation duly incorporated and doing business under the laws of the State of Wisconsin, and was then, and for more than one year prior thereto had been, using and operating a railway, to it belonging, through the city of Janesville aforesaid, and over and across said Academy street, and parallel with and adjacent to the railway of this defendant, and within ten feet therefrom; that the track of the said Milwaukee and Prairie du Chien Railway Company nearest the track of this defendant, where said tracks cross Academy street aforesaid, is not more than twenty feet distant from the most easterly track of this defendant; that this defendant and also the said Milwaukee & Prairie du Chien Railway Company had occasion to, and did, in the transaction of their respective business, pass and repass with their respective engines, tenders, and cars, propelled by steam, over and along their respective railways, and over and across said Academy street, a great number of times on each and every day, Sundays excepted, during all the time aforesaid, to the knowledge of the said Mary F. Whiton; that on said 23rd day of December,
13 1864, and for several years immediately preceding said day, the said Mary F. Whiton, with her said husband, resided within the distance of twenty-five rods westward from said railway tracks, and had, during all that time, from her said place of residence, an unobstructed view of said tracks where the same cross said Academy street, and of the engines and trains of cars passing and repassing thereon as aforesaid over and across said Academy street, and had personal knowledge on said 23d day of December, 1864, and during said several years prior thereto, of the location of said railway tracks across said Academy street, and of the use and occupation thereof as aforesaid, and was, during such time, in the habit of crossing said tracks in going from and returning to her said place of residence; that the railway track aforesaid of The Milwaukee and Prairie du Chien Railway Company was during all the aforesaid period of time located to the westward of the said railway tracks of this defendant, and adjacent to the side thereof nearest to the said place of residence of said Mary F. Whiton; that, on or about the said 23rd day of December, 1864, at or about the hour of eleven o'clock in the forenoon, this defendant, in the transaction of its business of using & operating its said railway by its agents and employees, was in the act of backing one of its engines and tenders, used at said city of Janesville as a switch engine & tender, and one car to said engine attached, in a southerly direction on its said railway track over and across said Academy street, the same being propelled by steam and moving over and across said street at a slow rate of speed, not exceeding four miles an hour; and that there was then and there an engine, with numerous freight cars to the same attached, propelled by steam and moving and passing northwardly on the aforesaid railway track of said Milwaukee

and Prairie du Chien Railway, and over and across said Academy street, and that at the same time the said Mary F. Whiton was
14 standing within eight feet of, and to the westward of, said engine and cars so passing and moving northwardly on said track of The Milwaukee and Prairie du Chien Railway over and across said Academy street, and on the opposite and farther side thereof from the said engine, tender, and car of this defendant so as aforesaid backing over and across said Academy street on the said railway track of this defendant; that the position last aforesaid of the said Mary F. Whiton, and of the said engine and cars so passing northwardly on said track of The Milwaukee and Prairie du Chien Railway, and of the said engine, tender, and car of this defendant then and there, was such that she, the said Mary F. Whiton, was not and could not be seen by the engineer in charge of, or other persons on the said engine & tender of this defendant so in the act of approaching and backing over & across said Academy street; and that the said Mary F. Whiton did not wait for said engine and cars so on the track of The Milwaukee & Prairie du Chien Railway, and passing over and across said Academy street, to pass entirely over and across the same, and did not listen or look for, or in any manner heed the approaching engine, tender, and car of this defendant so as aforesaid in the act of passing over and across said Academy street; but, placing her muff before her eyes, she, the said Mary F. Whiton, carelessly, negligently, and recklessly, from her position last aforesaid, suddenly sprang and ran around the rear end of the said engine and cars so then and there on the track of The Milwaukee & Prairie du Chien Railway to and upon the aforesaid railway track of this defendant, and under the wheels of the said tender and engine of this defendant so in the act of backing over and across said Academy street, and then and there received the injury referred to in the complaint in this action, without any carelessness, negligence, unskillfulness, or misconduct on the part of this defendant, or of the engineer or other person or persons in charge of said engine, tender, and car, or of any agent, servant, or employee of this defendant.

15 And this defendant denies all allegations of said complaint in so far as the same are inconsistent with the answer and defence secondly herein set forth.

A. A. JACKSON and
PEASE & RUGER,
Defendant's Attorneys.

STATE OF ILLINOIS, *Cook County, ss:*

James H. Howe, being first duly sworn, says that the defendant in this action is a corporation, and deponent is the solicitor of the same and an officer thereof; that deponent has read the foregoing answer, and knows the contents thereof; that the same is true to his own knowledge, except as to those matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

(S'd) JAMES H. HOWE.

Subscribed & sworn before me this 26th day of April, 1867.

[SEAL.] (S'g'd) E H. GRAVES,
Notary Public.

(Indorsed:) Circuit court, Rock county. Henry K. Whiton, adm'r, &c., against Chicago & Northwestern Railway Company. Copy answer. A. A. Jackson, Pease & Ruger, def't's att'ys, Janesville, Wis.

Circuit court, Rock County.

HENRY K. WHITON, AS ADM'R OF THE ESTATE of Mary F. Whiton, deceased,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

To the circuit court for Rock County:

The petition of the above-named defendant respectfully shows, upon information and belief, that the Hon. William P. Lyon, judge of said court, is so prejudiced against the said defendant that it cannot obtain a fair and impartial trial in said action in the county of Rock, where the venue is laid.

16 And your petitioner further says that it fears that it will not receive a fair and impartial trial in said action in the said county of Rock, where the same is pending, for the reason that the Hon. William P. Lyon aforesaid is prejudiced against the defendant and in favor of the plaintiff in said action.

Wherefore your petitioner prays that the place of trial of said action may be changed from said county of Rock to some county where the causes complained of do not exist.

A. A. JACKSON and
PEASE & RUGER,
Defendant's Att'ys.

STATE OF ILLINOIS, *Cook County, ss:*

Geo. L. Dunlap, being duly sworn, says that the defendant in the foregoing entitled action is a corporation, and has its principal office and place of business within the State of Wisconsin; that no officer of said defendant is, as defendant believes, within said State of Wisconsin; that deponent is an officer of said defendant, being the general superintendent of the same; that he has read the foregoing petition, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters which are therein stated upon information & belief, and as to those matters he believes it to be true.

GEO. L. DUNLAP.

Subscribed & sworn before me this 26th day of November, 1867, in the city of Chicago, county of Cook, and State of Illinois.

[SEAL.] ROBERT C. WRIGHT,
Commissioner of Deeds for the State of Wisconsin.

(Indorsed:) Circuit court, Rock Co. Henry K. Whiton, adm'r, &c., against The Chicago & Northwestern Railway Company. (Copy.)
Original filed Dec. 9, 1867.

GEO. R. PECK, *Clerk.*

Personal service of a copy of the within notice petition was admitted this 30th day of November, 1867.

17 Circuit court, Rock County.

HENRY W. WHITON, AS ADM'R OF THE ESTATE of Mary F. Whiton, deceased,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

On reading and filing notice of motion, and the petition of the de-

fendant above named, and on motion of A. A. Jackson, and Pease and Ruger, attorneys for said defendant, after hearing Messrs. Conger & Hawes, counsel for the plaintiff, ordered that the place of trial in this action be changed from the county of Rock to the county of Jefferson.

Dated December 9th, 1867.

By the court:

W'M B. LYON,
Judge of 1st Judicial Dist. of the State of Wisconsin.

(Indorsed:) Circuit court, Rock Co. Henry K. Whiton, adm'r, &c., ag'st C. & N. W. R'y Co. Order changing place of trial.

Filed Dec. 9th, 1867.

GEO. R. PECK, *Clerk.*

Circuit court for Jefferson County.

HENRY K. WHITON, ADM'R, &C.,
vs.
THE CHICAGO AND NORTHWESTERN RAILway Company.

To the circuit court for Jefferson County:

The petition of Henry K. Whiton respectfully showeth that he, in his capacity of administrator of the estate of Mary F. Whiton, deceased, is the plaintiff in the above-entitled suit; that your petitioner is, and for the last three years and more has continued to be, a resident and citizen of the State of Illinois, and that The Chicago and North-
18 western Railway Company, the defendant in this suit, was, at the time of the commencement of such action, and has ever since continued to be, a corporation duly organized under the laws of the State of Wisconsin; and within the perview of the laws of the United States, such defendant is, & ever since the commencement of this suit has been, a citizen of the State of Wisconsin; and the matter in dispute in the said action exceeded the sum of five hundred dollars, exclusive of costs.

And your petitioner prays that said suit may be removed into the next circuit court of the United States to be held in the district of Wisconsin, and to that end your petitioner here offers good and sufficient surety for his entering, in said circuit court of the United States on the first day of its next session, copies of all process, proceedings, depositions, testimony, and all other proceedings in said suit, and doing such other appropriate acts as by the laws of the United States are required to be done upon the removal of a suit into the United States court.

And your petitioner, &c.,

HENRY K. WHITON.

STATE OF ILLINOIS, *County of Cook, ss:*

Henry K. Whiton, the above petitioner, being duly sworn, says that he has read the foregoing petition signed by him, and knows the contents thereof, and that the same is true of his own knowledge.

HENRY K. WHITON.

Sworn and subscribed before me this 8th day of September, 1868. Witness my hand and official seal.

[SEAL.]

WARREN J. DURHAM,
Commissioner for Wisconsin.

STATE OF WISCONSIN, *Rock County, ss:*

Charles Norton, being duly sworn, says that on the 9th day of September, A. D. 1868, he served a true copy of the within petition on Messrs. Pease & Ruger, by delivering to and leaving the same with William Ruger, one of said firm, at Janesville, Wisconsin.

CHARLES NORTON.

Subscribed and sworn before me this 9th day of September, 1868.

J. C. SLOAN,
Notary Public Rock Co., Wis.

19 (Indorsed:) Circuit ct. Jefferson Co. Henry K. Whiton, adm'r, &c., vs. C. & N. W. R. R. Co. Petition. Copy.
Original filed Sept. 15, 1868.

P. N. WATERBURY, *Clerk.*

Circuit court for Jefferson County, Wisconsin.

HENRY K. WHITON, ADM'R, &C.,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Company.

STATE OF ILLINOIS, *County of Cook, ss:*

Henry K. Whiton, being first duly sworn, says that he, in his capacity of administrator of the estate of Mary F. Whiton, deceased, is the plaintiff in the above suit, and that he has reasons to believe, and does believe, that from prejudice, and also from local influence, he will not be able to obtain justice in the said court; and further deponent says not.

HENRY K. WHITON.

Sworn and subscribed before me this 8th day of September, 1868. Witness my hand and official seal.
[SEAL.]

WARREN J. DURHAM,
Commissioner for Wisconsin.

STATE OF WISCONSIN, *Rock County, ss:*

Charles Norton, being duly sworn, says that on the ninth day of September, A. D. 1868, he served a true copy of the within affidavit personally on William Ruger, one of the attorneys for the within-named defendant, at the city of Janesville, Wisconsin, by leaving the same with him.

J. C. SLOAN.

Subscribed & sworn before me this 9th day of September, 1868.

J. C. SLOAN,
Notary Public Rock Co., Wis.

(Indorsed:) Circuit court, Jefferson Co. Henry K. Whiton, adm'r, &c., vs. C. & N. W. R. R. Co. Aff't. Copy.
Original filed Sept. 15th.

P. N. WATERBURY, *Clerk.*

20 Know all men by these presents that we, Henry K. Whiton, of Chicago, Illinois, as principal, and *we* William A. Lawrence and Volney Atwood, of Rock County, Wisconsin, as sureties, are held and firmly bound unto The Chicago and Northwestern Railway Company

and its successors in the penal sum of one thousand dollars; for which payment, well and truly to be made to the said Chicago and Northwestern Railway Company, and its successors and assigns, we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated this 10th day of September, A. D. 1868.

The conditions of this obligation is such, that whereas there is now pending in the circuit court for Jefferson County, Wisconsin, a certain suit in which Henry K. Whiton, as administrator of the estate of Mary F. Whiton, deceased, is plaintiff, and The Chicago and Northwestern Railway Company is defendant, and the said plaintiff is about to apply to said circuit court by petition for the removal of such suit into the circuit court of the United States for the district of Wisconsin:

Now, if said petition shall be granted and the said suit shall so be removed, and the said Henry K. Whiton shall enter in the said circuit court of the United States, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do such other appropriate acts as by the laws of the United States are required to be done upon the removal of a suit into the said United States court, then this obligation shall be void; otherwise of force.

HENRY K. WHITON. [SEAL.]
WILLIAM A. LAWRENCE. [SEAL.]
VOLNEY ATWOOD. [SEAL.]

STATE OF WISCONSIN, *Rock County, ss:*

I, William A. Lawrence, and I, Volney Atwood, being each duly sworn, do severally depose and say that he is worth the sum of one thousand dollars, over and above all debts and liabilities, in property not by law exempt from execution.

21

WILLIAM A. LAWRENCE.
VOLNEY ATWOOD.

Subscribed and sworn to before me this 10th day of September, A. D. 1868.

C. C. KEELER,
Notary Public Rock Co., Wis.

(Indorsed:) Circuit court, Jefferson Co. Henry K. Whiton, adm'r, &c., vs. C. & N. W. R. R. Co. Bond. Copy.
Original, filed Sept. 15, 1868.

P. N. WATERBURY, *Clerk.*

Circuit court, Jefferson County.

HENRY K. WHITON, ADM'R, &C.,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

On reading and filing the petition of the plaintiff in this action, praying that the same may be removed for trial into the circuit court of the United States for the district of Wisconsin, together with the notice of such application and proof of service thereof on the attorney for the defendant on the 9th day of September, A. D. 1868, and upon reading

and filing the affidavits of said petitioner and of William H. Ferry and William Ruger, (which two last affidavits were read subject to the objection & exceptions of the plaintiff,) and it appearing that said plaintiff is a citizen of the State of Illinois, and the said defendant is a citizen of the State of Wisconsin, and that the matter in dispute in said action exceeds five hundred dollars, exclusive of costs; and said plaintiff having offered sufficient surety, approved by this court, for his entering in such circuit court of the United States, on the first day of its next session, copies of all process, pleadings, deposition, testimony, and other proceedings in said action, and doing such other appropriate acts as by the laws of the United States are required to be done upon the removal of the action into the said United States court:

22 On motion of Conger and Sloan, attorneys for the plaintiff in said action, it is ordered that the prayer of said petition be granted and allowed, and the clerk of this court is directed to transmit to the clerk of said circuit court of the United States, after the expiration of twenty days from the date hereof, duly authenticated copies of all process, pleadings, and other papers in this action upon the receipt of his lawful fees therefor from said petitioner, unless, before the expiration of said twenty days, the defendant in this action shall appeal from this order to the supreme court of the State of Wisconsin, in which case all proceedings under this order shall be stayed until after the determination of such appeal.

And said defendant shall give an undertaking upon such appeal in the sum of $3,000 00, to be approved by the judge of this court, conditioned for the payment, in case the order appealed from is affirmed, of any final judgment that may be recovered in the case by the appellee.

Dated September 16th, 1867.

By the court:

ALVA STEWART.

To the foregoing decision and order, and to the whole and every part thereof, the defendant excepts in due form of law, on the ground that the same, and every part thereof, is contrary to law, and for the reason that there was not any sufficient grounds for the granting of such order, and said defendant specifies the following grounds of exception to the said decision and order:

1st. It did not appear that sufficient notice of the application for such order was given, but, on the contrary, appeared that such notice was insufficient in point of time.

2nd. It did not appear that the matter in dispute in this action exceeds the sum of five hundred dollars, exclusive of costs.

3rd. It did not appear that the plaintiff and defendant in this action were citizens of different States, but, on the contrary, appeared that they were a citizen & corporation of the same State.

23 4th. Because there is no law authorizing the removal of this action into the circuit court of the United States for the district of Wisconsin.

5th. Because this action could only be brought in, and must be prosecuted in, some court established by the constitution and laws of the State of Wisconsin, and cannot be prosecuted in any other court whatever.

Dated September 16th, 1868.

ALVA STEWART, *Judge.*

(Indorsed:) 352. Law-docket B. Circuit court, Jefferson Co. Henry

K. Whiton, adm'r, against The Chicago & Northwestern Railway Company. Order of removal & excep.

Original filed September 16th, 1868.

P. N. WATERBURY, *Clerk.*

Filed November 9, 1868.

EDWARD KURTZ, *Clerk.*

DECEMBER 15TH, 1868.—This day came the plaintiff by his attornies, Messrs. Conger and Sloan, and filed their declaration as follows, to wit:

Declaration.

Circuit court of the United States, district of Wisconsin, ss, of the 1st Monday of January, A. D. 1869.

Henry K. Whiton, as administrator of all and singular the goods & chattels, rights and credits, of Mary F. Whiton, deceased, plaintiff in this suit, and who is a citizen of The State of Illinois, by Conger & Sloan, his attorneys, complains of The Chicago and Northwestern Railway Company, which is a corporation duly formed and organized under the laws of the State of Wisconsin, and a citizen of the State of Wisconsin, and the defendant in this suit, of a plea of trespass on the case:

For that whereas the said defendant is, and for more than six years last past has continued to be, a corporation as aforesaid, in the district aforesaid, and during all that time has been the owner and in the
24 possession and use of a certain railroad in said district, known as The Chicago and Northwestern Railway, together with the track, cars, locomotives, and other fixtures, & appurtenances thereunto belonging, and during all that time as such owner has operated, used and managed, and does still operate, use, and manage, the same.

And whereas a portion of the track and road of said defendant so owned, used, and operated by it, lies within the corporate limits of the city of Janesville, in said district, and did so lie within such limits during all the time aforesaid; and the said city of Janesville is, and for more than six yers last past has been, a city within said district, duly incorporated as such, under & by virtue of the laws of the State of Wisconsin, & situated in the county of Rock, in said district:

And whereas during all the time aforesaid there has been, and still continues to be, in said city a lawful, public, travelled street, known as Academy street; and during all such time the aforesaid railroad track of the said defendant, as located and operated by it through said city, crosses said street, and has so crossed the same and been operated and used across said street for more than six years last past.

And whereas the said Mary F. Whiton, while in life & health, to wit, on the 23d day of December, A. D. 1864, at the city aforesaid, was walking along, in, and upon said Academy street, in said city, where the same is crossed by said railroad track of the said defendant and so used & operated by it across the same as aforesaid, as she, the said Mary F., might rightfully & lawfully do; and while she, the said Mary F., was so cro sing said track in the street aforesaid, to wit, on the day & year last aforesaid, the said defendant, by its servants & employees then in charge of a locomotive engine attached to and propelling a tender and a car or cars of said defendant on said track, by the mere carelessness, negligence, unskillfulness, and culpable mismanagement of said defendant and its servants and employees, wrongfully ran said
25 tender and locomotive engine and said car or cars upon and

over the body of the said Mary F., at the place aforesaid, in said city, whereby she, the said Mary F., was mortally injured, so that she died of, and in consequence of, said injuries, and by reason thereof, within the space of seven weeks thereafter, in said city.

And the said plaintiff avers that, at the time & place when & where the said Mary F. was run over and injured as aforesaid, the said engine and cars and tender were by the said defendant, through its said servants and employees, propelled upon and along said track across said street at an unlawful rate of speed, to wit, at a rate of speed exceeding six miles an hour; and that, before crossing said street, & while crossing the same at the time said engine & cars ran over and injured said Mary F. as aforesaid, the defendant wrongfully and in violation of law neglected the bell on said engine to be rung, & the same was not rung before crossing said street, or while crossing the same; and that, at the time of the aforesaid injury to the said Mary F., and while said engine and cars were propelled and run upon said track over and across said street as aforesaid, the said defendant also carelessly and culpably neglected & omitted to give any warning or notice whatever of the approach of the same to said street, nor were any precautions whatever then & there taken or observed by said defendant or its said servants and employees in running said engine, cars, & tender to avoid inflicting said injuries upon the said Mary F., or to give her any warning of impending danger from said engine, tender, and cars, but, on the contrary thereof, said defendant, by its aforesaid servants and employees, then & there so carelessly, negligently, and unskillfully managed and run said engine, tender, and cars that, thro' and by reason of such carelessness, negligence, and unskillfullness, and the aforesaid wrongful acts of the said defendant, the aforesaid injury to the said Mary F. was caused and produced, and her death occasioned thereby as aforesaid.

26 And the plaintiff further avers that, at the time the said Mary F. was so run over and fatally injured as aforesaid, she was exercising due, proper, and reasonable care and diligence to avoid said engine, tender, and cars, and escape injury therefrom, but the said defendant, by its said servants and empoyees, so negligently and culpably mismanaged the said engine, tender, and cars, and the running of the same at the time & place when & where the said Mary F. was injured as aforesaid, that, by reason of such negligence and mismanagement, and without any fault or neglect on the part of the said Mary F., she was run over and mortally injured as aforesaid.

And the plaintiff further avers that the said Mary F. was the lawful, wedded wife of the said Henry K. Whiton at the time she was so injured as aforesaid, and that she died as aforesaid in said city of Janesville on the 7th day of February, A. D. 1865, intestate, leaving her said husband her surviving; and that she also left two children her surviving, to wit, Arthur Lee Whiton, who was born July 9, 1856, and Henry King Whiton, who was born October, 14, 1860, but who died October 11, 1866, and the said Arthur still survives; and at the time of the decease of the said Mary F., the said Arthur and the said Henry were the only issue and descendants of the said Mary F. and Henry K., her said husband.

And the plaintiff further avers that, by reason of the death of the said Mary F., caused and occasioned as aforesaid, the said Henry, her husband as aforesaid, has been deprived of her aid and assistance in his household affairs and in rearing their said children, and was put to great expense & loss in attempting to cure the said Mary F. of her injuries aforesaid, and has been otherwise greatly damaged by reason of the

aforesaid acts of the defendant, and has thereby sustained loss and damage to five thousand dollars.

And the plaintiff further avers that, on the 14th day of September, A. D. 1866, letters of administration upon the estate of the said Mary F. were duly issued and granted to the plaintiff by the county
27 court of Rock County, in the said district, whereby the said plaintiff was duly appointed administrator of all and singular the goods, chattels, rights, credits, & estate of the said deceased, the said Mary F. Whiton, and that he thereupon duly qualified as such administrator and entered upon the discharge of the duties of said office, and is still such administrator; and the plaintiff brings here into court the letters of administration aforesaid, which give sufficient evidence to the court here of the grant of such administration to the plaintiff as aforesaid.

To the damage of the plaintiff of five thousand dollars; wherefore he brings suit, &c.

CONGER & SLOAN,
Att'ys of Pl'ff.

And afterwards, to wit, at a stated term of said court, begun and held, according to law, at the city of Madison, on the first Monday of January, 1869, and on the first day thereof, to wit, on the 4th day of January, A. D. 1869—present, the Honorable Andrew G. Miller, district judge, presiding—the following proceedings were had, to wit:

HENRY K. WHITON, ADMINISTRATOR, &C.,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company.
} At law.

This day came the defendant's counsel, Messrs. Pease & Ruger, and moved the court to dismiss this case, and that all copies of process, pleadings, or other proceedings filed be stricken from the files for reasons filed; which are as follows, to wit:

Notice of motion to dismiss, &c.

Circuit court of the United States, district of Wisconsin.

HENRY K. WHITON, ADMINISTRATOR OF THE ESTATE of Mary F. Whiton, deceased, plaintiff,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company, defendant.

28 You will please take notice that we shall move the circuit court of the United States for the district of Wisconsin, at the next term of said court appointed to be held at the city of Madison, in said district, on the first Monday of January next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, that said court refuse to receive, and refuse to order or allow, the entry in said court of the action wherein H. K. Whiton, administrator of the estate of Mary F. Whiton, deceased, is plaintiff, and The Chicago & Northwestern Railway Company is defendant; which action, having been noticed for trial in said court, is above entitled for the pur-

poses of this notice and said motion, as pending in said court, but is the same action referred to in the affidavits of P. N. Waterbury, William Ruger, & James H. Howe, hereto annexed, as now pending on an appeal therein in the supreme court of the State of Wisconsin; that said circuit court of the United States for the district of Wisconsin refuse to direct or allow copies of any process, pleadings, depositions, testimony, or other proceedings in said action to be filed in said last-mentioned court; and in case the said action shall have been received by and entered in said court, when the said motion shall come on to be heard therein, that said action be dismissed and be stricken from the calendar of causes for trial in said court; that all copies of process, pleadings, or other proceedings in said action filed in the said last-mentioned court be stricken from the files of the same, and that the said defendant have such other or further relief as to said court shall seem meet; that such relief will be asked for the reasons stated in the motion of which a copy is herewith served upon you; and the said motion will be based and founded on the complaint in said action, the affidavits of James H. Howe, P. N. Waterbury, & William Ruger hereto appended, and copies of the pleadings and other proceedings in said action referred to in and attached to the said affidavit of William Ruger; of all which said affidavits,
29 pleadings, and other proceedings in said action copies are herewith served upon you.

Yours, &c.,

PEASE & RUGER,
Defendant's Att'ys.

To Messrs. CONGER & SLOAN,
Plaintiff's Att'ys.

STATE OF WISCONSIN, *Dane County, ss:*

William Ruger, being first duly sworn, deposes and says that, on the 21 day of December, A. D. 1868, and ten days prior to the first day of January, A. D. 1869, he served the foregoing notice, together with a copy of each of the affidavits and other papers and proceedings in said notice referred to, on Mess. Conger & Sloan, the attorneys for the plaintiff in the action in said notice entitled, by delivering to and leaving with H. S. Conger, one of said attorneys, a true copy of each of the same.

WILLIAM RUGER.

Subscribed & sworn before me this 6th day of January, A. D. 1869.
EDWARD KURTZ, *Clerk.*

STATE OF ILLINOIS, *Cook County, ss:*

James H. Howe, being first duly sworn, deposes and says that an action entitled as follows, to wit, "Circuit court, Jefferson County, Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, plaintiff, against The Chicago & Northwestern Railway Company, defendant," was pending in the circuit court for the county of Jefferson, in the State of Wisconsin, until on or about the 15th day of September, A. D. 1868, when the defendant therein appealed from an order of said circuit court removing said action into the circuit court of the United States for the district of Wisconsin, to the supreme court of the said State of Wisconsin, and said action is now pending on said appeal in said last-named court; that said defendant is a railway corporation, and deponent is an officer thereof, being the general solicitor of the same, & that said action is the only action pending between the said

Henry K. Whiton, as such administrator, or in any capacity, and
30 said defendant railway corporation in any court whatever.

JAMES H. HOWE.

Subscribed & sworn to before me this 19th day of December, A. D. 1868.

[SEAL.] EDWARD H. GRAVES,
Commissioner of Deeds for Wisconsin in Chicago, Illinois.

STATE OF WISCONSIN, *Jefferson County, ss:*

P. N. Waterbury, being first duly sworn, deposes & says that he is, and since a date prior to the 1st day of September, A. D. 1868, has been, the clerk of the circuit court of the county of Jefferson, in said State of Wisconsin; that, on the 15th day of said September, an action entitled as follows, to wit, "Circuit court of Jefferson County, Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, plaintiff, against The Chicago & Northwestern Railway Company, defendant," was pending in said circuit court for the county of Jefferson, and was the only action pending in said court between said parties; that, on or about the 24th day of said September, the above-named defendant in said action appealed to the supreme court of the State of Wisconsin from an order of the said circuit court, made & entered in said action on the 16th day of said September, & dated on that day, directing the removal of said action into the circuit court of the United States for the district of Wisconsin; that this deponent, as such clerk, upon the taking of such appeal, did, pursuant to the laws of said State of Wisconsin, transmit to the clerk of said supreme court the summons and complaint & answer in said action; also, the notice of motion for the removal of the same, the affidavit & petition of the plaintiff upon which said motion was based, the affidavits of William Ruger & W. H. Ferry, read on the hearing of such motion in opposition thereto, the said order of removal of said action into the circuit court of the United States for the district of Wisconsin, the exceptions thereto filed
31 by the defendant, the notice of appeal from said order, the undertaking given upon such appeal, and the order of said circuit court for the county of Jefferson staying all proceedings, under the said order so appealed from, until the determination of such appeal; that this deponent has never forwarded or transmitted, or authorized to be forwarded or transmitted, on behalf of deponent as such clerk, or at all, any of the process, pleadings, or other proceedings whatever in said action, or any copy of any of such process, pleadings, or other proceedings; but, deponent says, that, on or about the 28th day of September, he was requested by the plaintiff in said action to send to him, at Chicago, by mail, certified copies of certain of the process, pleadings, & other proceedings in said action, viz, copies of the summons & complaint, with the return of the sheriff on the summons; of the demurrer to the complaint; of the order of the circuit court of Rock County sustaining the demurrer; of the remittitur of the supreme court of Wisconsin reversing the order of the circuit court of Rock County sustaining the demurrer; of the answer to the complaint; of the affidavit to change place of trial from said county of Rock to the said county of Jefferson; of the order of the circuit court of said Rock County changing the place of trial of said action to the county of Jefferson aforesaid; of the affidavit & petition for & bond given on removal of said action to the circuit court of the United States for the district of Wisconsin; & of the order of said circuit court for the county of Jef-

ferson removing said action into the said circuit court of the United States for the district of Wisconsin; that said plaintiff did not inform this deponent for what purpose he wished said copies, and deponent did not know for what purpose the same were wanted; but deponent, on or about the 16th day of October, sent such copies to the plaintiff, in accordance with his aforesaid request.

P. N. WATERBURY.

Subscribed & sworn to before me this 16th day of December, A. D. 1868.

[SEAL.] WARREN H. PORTER,
Notary Public Jeff. Co., Wis.

32 STATE OF WISCONSIN,
Rock County, ss:

William Ruger, being duly sworn, deposes and says that he resides at Janesville, in said county & State, and is one of the attorneys for the defendant in an action wherein Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, is plaintiff, and The Chicago & Northwestern Railway Company is defendant; that, on the 15th day of September, A. D. 1868, said action was pending in the circuit court for the county of Jefferson, in said State of Wisconsin; that on that day the said plaintiff in said action petitioned and moved said circuit court for the county of Jefferson for an order removing said action into the circuit court of the United States for the district of Wisconsin; that said motion was heard & decided by said circuit court for the county of Jefferson upon the affidavit & petition of said plaintiff, the affidavits of William H. Ferry & this deponent, & the complaint in said action, of which said affidavits of William H. Ferry & this deponent, & of said complaint, copies are hereto annexed & marked respectively "A," "B," "C;" that thereupon the said circuit court for the county of Jefferson, by its order made & entered in said action, bearing date on the 16th day of said September, & of which a copy is hereto attached, & marked "D," ordered the removal of said action into the said circuit court of the United States for the district of Wisconsin; that in & by said order the clerk of said circuit court for the county of Jefferson was directed to transmit to the clerk of said circuit court of the United States, after the expiration of twenty days from the date of such order, duly authenticated copies of all process, pleadings, & other papers in said action, upon the receipt of his lawful fees therefor from the said plaintiff, unless before the expiration of said twenty days the defendant in said action should appeal from such order to the supreme court of the State of Wisconsin, in which case all proceedings under said order should be
33 stayed until after the determination of such appeal; that the defendant in said action, in due form of law, excepted in writing to said order at the time when said order was so made & entered in said action, a copy of which exceptions is hereto appended & marked "E;" that before the expiration of said twenty days, & on the 24th day of said September, the said defendant duly completed and perfected an appeal to said supreme court of the State of Wisconsin from the whole & every part of said order removing said action into the circuit court of the United States for the district of Wisconsin; that thereupon, and on the 25th day of said September, this deponent, as such attorney, procured an order from said circuit court for the county of Jefferson, of which a copy is hereto annexed & marked "F," staying all proceedings under such order removing such action into said circuit court of the United States for the district of Wisconsin until

the determination of such appeal; that, on said 25th day of September, this deponent duly, personally served the said last-mentioned order on the clerk of said circuit court for the county of Jefferson, and on said attorneys for the aforesaid respondent in said action; that, upon such service upon them, said attorneys for said respondent gave to this deponent a written admission of the service upon them of said last-mentioned order, a copy of which admission is endorsed on the copy of said order so hereto annexed & marked "F;" that said action is now, and since said 24th day of September, 1868, has been, pending on such appeal in the supreme court of the State of Wisconsin; but deponent saith that, notwithstanding the pendency of such appeal in said action in said supreme court, and before the determination thereof, the attorneys for the plaintiff in said action, disregarding & disobeying said orders of said circuit court for the county of Jefferson, so directing a stay of all proceedings upon the part of said plaintiff, now such respondent, under the order in said action so appealed from until the determination of such appeal, have served upon the attorneys for said defendant, now appellant in such action, notice that said action will be brought on for trial in the said circuit court of the United States
34 for the district of Wisconsin, at the term thereof commencing on the first Monday of January, 1869, of which notice a copy is hereto annexed, marked "G;" that in & by said notice the said action is incorrectly & falsely, as deponent believes, described as pending in said last-named court; that the action so noticed for trial in said last-named court is the same action so pending on said appeal in said supreme court of the State of Wisconsin; that said action is brought under and solely by authority of sections 12 and 13 of chapter 135 of the Revised Statutes of the State of Wisconsin, to recover for the pecuniary injury resulting to Henry K. Whiton, the respondent in said action on such pending appeal, from the death of his wife, Mary F. Whiton, alleged to have been caused by the wrongful act, neglect, or default of said appellant; that the aforesaid sections 12 & 13 of said chapter 135 of the Revised Statutes of the State of Wisconsin provide & are in the words & figures as follows, to wit:

"SECTION 12. Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damage in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured: *Provided*, That such action shall be brought for a death caused in this State, and in some court established by the constitution & laws of the same.

"SECTION 13. Every such action shall be brought by & in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal
35 ancestors, in default of such descendants; and in every such action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair & just in reference to the pecuniary injury resulting from such death to the relatives of the deceased specified in this section, provided every such action shall be commenced within two years after the death of such deceased person."

WILLIAM RUGER.

Subscribed & sworn to before me this 21st day of December, A. D. 1868.

WILLARD MERRILL,
U. S. Circuit Court Commissioner for the Circuit Court of the District of Wisconsin.

Circuit court, Jefferson County.

HENRY K. WHITON, ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

STATE OF WISCONSIN, *Rock County, ss:*

William H. Ferry, being duly sworn, deposes & says that the defendant in this action is a railway corporation created by and existing under the laws of the States of Illinois, Wisconsin, & Michigan; that the line of railway of said corporation is in part located and is operated within each of said States, and was so located & operated in each of said States of Illinois & Wisconsin at the date of the commencement of said action; that, at the date of the commencement of said action, said defendant corporation was exercising, and has ever since continued to exercise, powers and franchises in each of said States of Illinois & Wisconsin, to it granted by said States respectively; that said corporation was, at the date of the commencement of said action, and now is, doing business and operating its said railway in each of said States of Illinois & Wisconsin pursuant to and by virtue of the laws of the same respectively, and is now doing business & operating its said railway in said State of Michigan under and by virtue of the laws thereof; that the whole of said line of railway so located and operated in part
36 in each of said States of Illinois, Wisconsin, & Michigan is managed and controlled by the said defendant as a single railway corporation and line of railway; that said corporation is but a single corporation, having all its powers and franchises exercised, and its affairs managed and controlled, by one board of directors and officers; that deponent is an officer of said defendant corporation, being one of the board of directors thereof; that said defendant corporation has its principal office and place of business at the city of Chicago, in the State of Illinois, where the principal and general business and affairs of said corporation and of its said railway were, at the date of the commencement of said action, and are now controlled and managed by a board of officers of said corporation; and that there is not any office for the control or management of the general business and affairs of said corporation in said State of Wisconsin.

WM H. FERRY.

Subscribed & sworn to before me this 11th day of September, A. D. 1868.

WILLIAM RUGER,
Notary Public Rock Co., Wisc.

(Indorsed:) Ct. ct., Jeff. Co. Henry K. Whiton, adm'n'r, &c., against The C. & N. W. R'y Co. Copy. Aff. of W. H. Ferry.

Circuit court, Jefferson County.

HENRY K. WHITON, ADMIN'R, &C.,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

STATE OF WISCONSIN, *Jefferson County, ss:*

William Ruger, being duly sworn, says that he is one of the attorneys in this action for the defendant therein; that said defendant is a
37 railway corporation in part created by and organized under the laws of the State of Wisconsin, and in part created by and organized under the laws of the State of Illinois; that said defendant corporation's line of railway is in part located in and operated in each of said States pursuant to and by virtue of the laws of the same respectively; that said defendant has its principal office and place of business at the city of Chicago, in said State of Illinois, where, as deponent believes, its principal affairs and business are controlled & conducted, and its principal managing officers reside; that the plaintiff in this action prosecutes the said action as the administrator of the estate of Mary F. Whiton, deceased, by virtue of letters of administration issued by a judicial officer of the State of Wisconsin, under the authority of the laws thereof; that, as deponent believes, the amount in dispute in this action does not exceed the sum of five hundred dollars, exclusive of costs; that notice of the said plaintiff's motion for the removal of this action to the circuit court of the United States for the district of Wisconsin was not served on the attorneys for the defendant in this action until the 9th day of September, A. D. 1868.

W. RUGER.

Subscribed and sworn to before me this 15th day of September, A. D. 1868.

J. W. BIRD, *County Judge.*

(Indorsed:) Circuit court, Jeff. Co. Whiton, adm'n'r, &c., vs. The C. & N. W. R'y Co. Copy. Aff. of W. Ruger.

Circuit court for Rock County.

The State of Wisconsin to the Chicago & Northwestern Railway Company, defendant:

You are hereby summoned to answer the complaint of Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, plaintiff, which will be filed in the office of the clerk of the circuit court for
38 Rock County, at the city of Janesville, in said county, of which a copy is hereunto annexed, and herewith served upon you, and to serve a copy of your answer on us at our office, in the city of Janesville, Rock County, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

CONGER & HAWES, *Plf's Att'ys.*

[U. S. internal revenue stamp, 50 cents, canceled.]

Circuit court, Rock County.

HENRY K. WHITON, ADMINISTRATOR OF THE ESTATE of Mary F. Whiton, deceased, plaintiff,
ag'st
THE CHICAGO & NORTHWESTERN RAILWAY Company, defendant.

Henry K. Whiton, administrator of Mary F. Whiton, deceased, plaintiff, for complaint in this action says that The Chicago & Northwestern Railway Company, the above-named defendant, is, & for more than four years last past has been, a railroad corporation within the State of Wisconsin, duly incorporated & organized under & by virtue of the laws of said State, under the name of The Chicago & Northwestern Railway Company, & doing business as such corporation within said State under the aforesaid name; that the defendant is, and for more than four years last past has been, the owner & in the possession & use of the Chicago & Northwestern railway & road within said State, together with the track, cars, locomotives, engines, & all other fixtures & appurtenances thereunto belonging, & as such owner has during all the time aforesaid used, operated, & managed, & does now use, operate, & manage, the same; that a portion of the track & road of the defendant so owned, used, operated, & managed as aforesaid lies within the corporate limits of the city of Janesville, in said State, & did so lie within such limits during all the time aforesaid; that said city of Janesville is, & for more than four years last has been, a duly incorporated city within said State, under & by virtue of the laws of said State, situate in the county of Rock, in said State; that during all the time aforesaid there has been & now is in said city a lawful, public, traveled street called Academy street, & known as such; that the aforesaid track of said defendant, as located & operated through said city, crosses said Academy street, & has so crossed the same, & been operated & used across said street for more than four years last past.

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And the plaintiff, upon information & belief, further says that, on the 23d day of December, 1864, the said Mary F. Whiton, then in full life & health, was walking along, in, & upon said Academy street, in said city, where the same is crossed by said road track of the defendant, & so used and operated across the same as aforesaid, as she, the said Mary F., might rightfully & lawfully do; & while so crossing said track in the street aforesaid, the said defendant, by its servants & employees then in charge of a locomotive engine attached to and propelling a tender & a car or cars of said defendant on said track, by the carelessness, negligence, unskillfulness, and culpable mismanagement of said defendant & its servants & employees, wrongfully run said tender & locomotive engine, & said car or cars, upon & over the body of the said Mary F., at the place aforesaid, in said city & State, whereby she, the said Mary F., was mortally injured, so that she died of, & in consequence of, said injuries, & by reason thereof, within the space of seven weeks thereafter, in said city of Janesville, in the State aforesaid; that, at the time said Mary F. was so run over & injured as aforesaid, the said engine & cars were propelled upon & along said track across said street at an unlawful rate of speed, to wit, at the rate of speed of more than six miles an hour; & that, before crossing said street, & while crossing the same, at the time said engine & cars run over & injured said Mary F. as aforesaid, the defendant wrongfully neglected to cause the bell on said engine to be rung, and the same was not

rung, before crossing said street or while crossing the same; that at the time of the aforesaid injury, & while said engine & cars were propelled & run upon said track over & across said street as aforesaid, said
40 defendant also carelessly & culpably neglected & omitted to give any warning or notice whatever of the approach of the same to said street, nor were any precautions whatever then & there taken or observed by said defendant, or its servants & employees, in running said engine & cars to avoid said injury or give notice of danger; but, on the contrary thereof, said defendant, by its aforesaid servants & employees, then & there so carelessly, negligently, & unskillfully managed & run said engine & cars that, through & by reason of the negligence of the defendant & its servants, & by their aforesaid wrongful acts, neglect, & default, the aforesaid injury to & death of the said Mary F. were caused & produced by said defendant as aforesaid; that, at the time the said Mary F. was so run over & injured as aforesaid, she was exercising proper & reasonable care & diligence to avoid said engine & cars & escape injury therefrom; but the said defendant, by its servants & employees, so negligently & culpably mismanaged the said engine & cars, & the running of the same, that, by reason of such negligence & mismanagement, & without any fault or neglect on the part of the said Mary F., she, the said Mary F., was run over & killed as aforesaid; that the said Mary F. was the lawful, wedded wife of the said Henry K. Whiton, & that she died as aforesaid, in said city of Janesville, on the 7th day of February, 1865, intestate, leaving her said husband, the said Henry K. Whiton, her surviving, & that she also left two children her surviving, to wit, Arthur Lee Whiton, aged at that time eight years, & Henry King Whiton, then aged four years, who are the only issue of the said Mary F. & Henry K.; & that the said Henry K. Whiton, Arthur Lee Whiton, & Henry King Whiton still survive; that by reason of the death of the said Mary F., caused and occasioned as aforesaid, the said Henry K. has been deprived of her aid & assistance in his household affairs & in rearing their said children, and has otherwise been greatly injured, & has thereby sustained & suffered great loss, to his damage five thousand dollars; that on the
14th day of September, 1866, letters of administration upon the
41 estate of the said Mary F. were duly issued & granted to the plaintiff by the county court for Rock County, whereby the said plaintiff was duly appointed administrator of all & singular the goods, chattels, rights, credits, & estate of the said deceased, the said Mary F. Whiton, and that he thereupon duly qualified as such administrator, & entered upon the discharge of the duties of said office, & is now such administrator.

Wherefore the plaintiff, as such administrator as aforesaid, demands judgment against the defendant, for the aforesaid injuries & damages, in the sum of five thousand dollars, together with costs of this action.

CONGER & HAWES,
Pl'ff's Att'ys.

STATE OF ILLINOIS, *Cook County, ss:*

Henry K. Whiton, being duly sworn, says he is the plaintiff in this action, & that the foregoing complaint is true to his own knowledge, except as to those matters which are therein stated on information & belief, & as to those matters he believes it to be true.

HENRY K. WHITON.

Subscribed & sworn before me this 24th day of September, 1866.
[SEAL.] J. A. SLEEPER,
Com'r for Wisconsin, residing in Chicago, Illinois.

(Indorsed:) Circuit court, Rock Co. Henry K. Whiton, administrator, &c., ag'st The Chicago & Northwestern Railway Co. Copy sum's & compl't. Conger & Hawes, att'y s for pl'ff.

Circuit court, Jefferson County.

HENRY K. WHITON, ADM'N'R, &C.,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

42 On reading and filing the petition of the plaintiff in this action, praying that the same may be removed for trial into the circuit court of the United States for the district of Wisconsin, together with the notice of such application & proof of service thereof on the attorneys for the defendant, on the 9th day of September, A. D. 1868, and upon reading and filing the affidavits of said petitioner and of William H. Ferry and William Ruger, (which two last affidavits were read subject to the objections & exceptions of the plaintiff,) and it appearing that said plaintiff is a citizen of the State of Illinois, and the said defendant is a citizen of the State of Wisconsin, and that the matter in dispute in said action exceeds five hundred dollars, exclusive of costs, and said plaintiff having offered sufficient surety, approved by this court, for his entering in such circuit court of the United States, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in said action, and doing such other appropriate acts as by the laws of the United States are required to be done upon the removal of an action into the said United States court:

On motion of Conger and Sloan, attorneys for the plaintiff in said action, it is ordered that the prayer of said petition be granted and allowed, and the clerk of this court is directed to transmit to the clerk of said circuit court of the United States, after the expiration of twenty days from the date hereof, duly authenticated copies of all process, pleadings, and other papers in this action, upon the receipt of his lawful fees therefor from said petitioner, unless, before the expiration of said twenty days, the defendant in this action shall appeal from this order to the supreme court of the State of Wisconsin, in which case all proceedings under the order shall be stayed until after the determination of such appeal. And said defendant shall give an undertaking upon such appeal in the sum of $3,000 00, to be approved by the judge of this court. conditioned for the payment, in case the order appealed from is affirmed, of any final judgment that may be recovered in the case by the appellee.

43 Dated September 16th, 1868.
By the court:

ALVA STEWART.

To the foregoing decision and order, and to the whole and every part thereof, the defendant excepts, in due form of law, on the ground that the same and every part thereof is contrary to law, and for the reason that there was not any sufficient ground for the granting of such order;

and said defendant specifies the following grounds of exception to the said decision and order:

1st. It did not appear that sufficient notice of the application for such order was given, but, on the contrary, appeared that such notice was insufficient in point of time.

2nd. It did not appear that the matter in dispute in this action exceeded the sum of five hundred dollars, exclusive of costs.

3rd. It did not appear that the plaintiff and defendant in this action were citizens of different States, but, on the contrary, appeared that they were a citizen & corporation of the same State.

4th. Because there is no law authorizing the removal of this action into the circuit court of the United States for the district of Wisconsin.

5th. Because this action could only be brought in and must be prosecuted in some court established by the constitution and laws of the State of Wisconsin, and cannot be prosecuted in any other court whatever.

Dated September 16th, 1868.

ALVA STEWART, *Judge.*

(Indorsed:) Ct. ct., Jefferson Co. Henry K. Whiton, adm'n'r, &c., against The C. & N. W. R'y Co. Copy order of removal. Exceptions.

Personal service of a copy of the within exceptions on us this 24th day of September, 1868, is hereby admitted.

CONGER & HAWES,
Pl'ff's Att'ys.

44 Circuit court, Jefferson County.

HENRY K. WHITON, ADMINISTRATOR OF THE ESTATE of Mary F. Whiton, deceased, plaintiff,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company, defendant.

The defendant, having appealed to the supreme court of the State of Wisconsin from the order of this court made and entered herein on the 16th day of September, A. D. 1868, granting the application of the plaintiff for the removal of this action to the circuit court of the United States for the district of Wisconsin, on motion of Pease & Ruger, attorneys for the defendant, ordered that all proceedings on said order be stayed until the determination of said appeal.

Dated September 25th, A. D. 1868.

By the court:

ALVA STEWART, *Judge.*

(Indorsed:) Circuit court, Jefferson Co. Henry K. Whiton, adm'r, &c., against The C. & N. W. R'y Co. Copy stay of proceedings.

Personal service on us this day of an order, of which the within is a copy, is hereby admitted.

Dated Sept. 25, 1868.

CONGER & HAWES,
Pl'ff's Att'ys.

Circuit court of the United States.

HENRY K. WHITON, ADMINISTRATOR OF THE estate of Mary F. Whiton, dec'd, pl'ff,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company, def't.

GENT.: Please take notice that the above action will be brought on for trial at the next term of said court, appointed to be held at
45 the city of Madison, in said district, on the 1st Monday of January next, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and the plaintiff will be examined as a witness in his own behalf on such trial.

Dated December 8th, 1868.

Yours, &c.,

CONGER & SLOAN,
Att'ys of Pl'ff.

To Mess. PEASE & RUGER,
Att'ys of Def't.

(Indorsed:) Cir. ct. U. S., dist. of Wis. Whiton, adm'r, &c., vs. C. & N. W. R. W. Co. Notice of trial. Rec'd Dec. 9th, 1868.

Motion to dismiss, &c.

Circuit court of the United States, district of Wisconsin.

HENRY K. WHITON, ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased, plaintiff,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company, defendant.

And now comes the defendant in the action referred to in the affidavits and notice hereto annexed, & wherein Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, is plaintiff, and The Chicago and Northwestern Railway Company is defendant, which action, having been noticed by said plaintiff for trial in this court, is, for the purposes of this motion, above entitled as pending therein, and by Pease & Ruger, its attorneys in said action, for the purposes of this motion only, appears in and moves this honorable court that it refuse to receive, and refuse to order or allow, the entry in this court of said action; that it refuse to direct or allow copies of any process, pleadings, depositions, testimony or other proceedings in said action to be filed in this court; and, in case the said action has been received by and entered in this court, that the same be dismissed and be stricken from the calendar of causes for trial in this court; that all copies of process, pleadings,
46 or other proceedings in this action filed in this court be stricken from the files of the same; and that the defendant have such other or further relief as to this court shall seem meet.

The relief hereinbefore prayed is asked for the following reasons:

1st. Because it appears that the plaintiff and defendant in said action are respectively a citizen and a corporation of the same State, and appears that a judgment in said action will operate as, and be a judgment against, and be collectable from, a corporation of the State of Illinois, where the plaintiff resides.

2nd. Because said action is now pending in the supreme court of the State of Wisconsin, on an undetermined appeal from an order made in the same by the circuit court of said State of Wisconsin for the county of Jefferson therein, which said supreme court of the State of Wisconsin is a court of competent jurisdiction to hear and determine said appeal, and which said circuit court of said State for the county of Jefferson therein is a court of competent jurisdiction to try and determine said action.

3rd. Because there is no authority of law for the removal into, or for the prosecution or maintenance of said action in this, the circuit court of the United States for the district of Wisconsin.

4th. Because said action is sought to be, and can only be, maintained under and by authority of sections 12 and 13 of chapter 135 of the Revised Statutes of the State of Wisconsin, which give the exclusive jurisdiction of said action to the courts established by the constitution and laws of said State.

5th. And it is moved that said action be stricken from the calendar of causes for trial in this court for the further reason that the same was not pending therein when noticed for trial.

PEASE & RUGER,
Defendant's Attorneys.

(Indorsed:) Ct. ct. U. S., dist. of Wis. Henry K. Whiton, adm'r, &c., vs. The C. & N. W. R'y Co. Mo. to dismiss, &c. Pease & Ruger, def't's att'ys.

47 *Motion argued.*

JANUARY 6TH, 1869.—Present, the Hon. Andrew G. Miller, district judge, presiding. This day came the parties by their counsel, and the motion to dismiss this case came on to be heard and was argued, when the court took the same under advisement.

Motion overruled, &c.

JANUARY 7TH, 1869.—Present, the Honorable Andrew G. Miller, district judge, presiding. This day came the parties by their counsel, and on consideration of the motion to dismiss this cause, it is ordered by the court that the said motion be, and hereby is, overruled. And upon the application of defendant's counsel, it is ordered by the court that the time for pleading to the plaintiff's declaration be extended to the first Monday of February next.

JANUARY 30TH, 1869.—This day came the defendant by its attorney, Mr. William Ruger, and filed its plea, as follows:

Plea in abatement.

Circuit court of the United States for the district of Wisconsin, of the 1st Monday of February, A. D. 1869.

THE CHICAGO & NORTHWESTERN RAILWAY Company
ads.
HENRY K. WHITON, AS ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased.

And the said The Chicago & Northwestern Railway Company, a cor-

poration aggregate, comes and defends, &c., and says that this court ought not to have or take further cognizance of the action aforesaid, because it says that said action is brought solely for the purpose of recovering the damages authorized to be recovered by sections twelve (12) and thirteen (13) of chapter one hundred and thirty-five (135) of the Revised Statutes of the State of Wisconsin for the pecuniary injuries resulting to the said Henry K. Whiton from the death of his wife, the said Mary F. Whiton; that the sole and only cause of action in the said declaration stated is for the recovery of such damages, and said action can only be maintained and such damage be recovered by
48 authority of the aforesaid sections 12 and 13 of chapter 135 of the Revised Statutes of Wisconsin, whereby it is enacted as follows, to wit:

"SECTION 12. Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damage in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured: *Provided*, That such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same.

"SECTION 13. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants, and in every such action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just, in reference to the pecuniary injury resulting from such death, to the relatives of the deceased specified in this section, provided every such action shall be commenced within two years after the death of such deceased person."

And the said defendant avers that the cause of action aforesaid, if any exists, exists only by virtue of said statute, and by said statute it is expressly provided that the courts established by the constitution and laws of said State shall have exclusive jurisdiction of actions brought for a death caused in this State; and this defendant further avers that the cause of action aforesaid, if any hath accrued to the plaintiff, accrued under said law and within the State of Wisconsin, and within the exclusive jurisdiction of the courts established by the constitution and laws of said State, and not within the jurisdiction of this court.

And this the said defendant is ready to verify.

Wherefore the said defendant prays judgment, if the court here will take further cognizance of or sustain the said action.

WILLIAM RUGER,
Defendant's Attorney.

W'M P. LYNDE, *of Counsel.*

STATE OF ILLINOIS, *Cook County, ss:*

James H. Howe, being sworn, says that The Chicago & Northwestern Railway Company, the defendant in the foregoing entitled action, is a corporation aggregate; that this deponent is an officer thereof, being

the general solicitor of the same; that he has read the foregoing plea of said defendant, and knows the contents thereof, and that the same is true to his own knowledge; and further, that the said plea is true in substance and matter of fact, and that it is not interposed for delay.

JAMES H. HOWE.

Subscribed & sworn to before me this 27th day of January, A D. 1869.
[SEAL.] FRANKLIN HATHEWAY,
Notary Public, residing at Chicago, Ill.

I, W'm P. Lynde, an attorney and counsellor of this court, do certify that I have examined the foregoing plea of the defendant, and that, in my opinion, the same is well founded.
Dated Jan'y 30th, A. D. 1869.

W'M P. LYNDE.

FEBRUARY 19, 1869.—This day came the plaintiff by his attorneys, and filed his demurrer, as follows:

Demurrer.

Circuit court of the United States, district of Wisconsin.

HENRY K. WHITON, ADM'R, &C.,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company.

And the said plaintiff says that the said plea of the defendant, and the matters therein contained in manner & form as the same are
50 therein set forth, are not sufficient in law to quash said writ; and that the plaintiff is not bound by law to answer the same.
Wherefore the plaintiff prays judgment, &c.
And the plaintiff also shows to the court here the following special causes of demurrer to the said plea, viz:
First. The said plea does not in its commencement pray judgment of the writ and declaration in this suit, but only avers that this court "ought not to have or take further cognizance of the action aforesaid."
Secondly. The said plea does not in its conclusion, or in any other part thereof, pray judgment of the said writ and declaration, and that the same may be quashed, but only "prays judgment if the court here will take further cognizance of or sustain the action."
Thirdly. The said plea is signed by the attorney of the defendant and not by the defendant through its proper officer, nor is it sealed with the corporate seal of the defendant.
Fourthly. The said plea is in other respects uncertain, informal, and insufficient.

CONGER & SLOAN,
Att'ys of Pl'ff.

I, Joseph A. Sleeper, a counsellor of said court, hereby certify that, in my opinion, the said general demurrer and the said special demurrers are well founded.

J. A. SLEEPER, *of Counsel.*

FEBRUARY 24, 1869.—This day came the defendant by its attorney, and filed its joinder, as follows:

Joinder in demurrer.

Circuit court of the United States for the district of Wisconsin,
51 of the 1st Monday of March, A. D. 1869.

THE CHICAGO & NORTHWESTERN RAILWAY Company
ads.
HENRY K. WHITON, AS ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased.

And the said defendant saith that the said plea of the said defendant, and the matters therein contained, are sufficient in law to prevent this court from having or taking further cognizance of the action aforesaid, and which said plea, & the matters therein contained, the said defendant is ready to verify and prove, as the court here shall direct, &c. Wherefore, inasmuch as the said plaintiff hath not denied, nor in any manner answered, the said plea, the said defendant, as before, prays judgment if the court here will take further cognizance of or sustain the said action.

WILLIAM RUGER,
Defendant's Attorney.

Demurrer to plea sustained, &c.

SEPTEMBER 21, 1869.—Present, the Honorable Andrew G. Miller, district judge, presiding, alone. This day came the parties by their counsel, and, the demurrer to the defendant's plea in abatement being submitted, on consideration thereof it is ordered by the court that said demurrer be sustained, and that said plea be and hereby is overruled; and further, that the defendant plead over by the first Monday of October next.

SEPTEMBER 27, 1869.—This day came the defendant by its attorney, and filed its plea of the general issue, with notice, as follows:

Plea & notice.

Circuit court of the United States for the district of Wisconsin, of the 1st Monday of February, A. D. 1869.

THE CHICAGO & NORTHWESTERN RAILWAY Company
ads.
HENRY K. WHITON, AS ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased.

And the said The Chicago & Northwestern Railway Company,
52 defendant in this suit, by William Ruger, its attorney, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed greivances above laid to its charge in manner and form as the said plaintiff hath above thereof complained against it, &c.

And of this it, the said defendant, puts itself upon the country; (and the said plaintiff doth the like, &c.)

WILLIAM RUGER,
Defendant's Attorney.

WM P. LYNDE, *of Counsel.*

GENTLEMEN: Please to take notice that the said defendant, at the trial of the above cause, will insist upon and give in evidence, under the general issue above pleaded, that the said Mary F. Whiton, deceased, in her lifetime, and at the time & place of receiving the injuries in the declaration in this action referred to, and therein alleged as the ca use of her death, was guilty of wrongful and negligent act & omissions, which directly contributed to cause said injuries, and without which she would not have received or suffered such or any injury whatever; that said Mary F., at the time and place aforesaid, wrongfully and negligently omitted & failed to look or listen or take any precaution or care whatever to avoid receiving injury, but that, on the contrary, the said Mary F., at the time & place aforesaid, wrongfully and negligently went upon the track of defendant's railway, in front of the approaching engine, tender, and car of the defendant, and then & there received the injuries aforesaid in consequence of her aforesaid wrongful & negligent acts and omissions.

Dated this 27 day of Sept., A. D. 1869.

Yours, &c.,

WILLIAM RUGER,
Defendant's Attorney.

And now, at this same term, April term, A. D. 1870, and on the second day thereof, to wit, on the 12th day of *of* April, A. D. 1870—present and presiding, the Honorable Thomas Drummond, circuit judge, and the Honorable Andrew G. Miller, district judge—the following proceedings were had, to wit:

53 This day came the defendant's counsel, Mr. Ruger, and moved the court to remand this cause to the circuit court for the county of Jefferson, for the reason that this court has never acquired jurisdiction of the same; which motion is as follows:

Motion to remand case to State court.

Circuit court of the United States for the district of Wisconsin.

THE CHICAGO & NORTHWESTERN RAILWAY Company
ads.
HENRY K. WHITON, AS ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased.

And now comes the defendant, The Chicago & Northwestern Railway, by its counsel, and moves the court now here that this suit be remanded to the circuit court for the county of Jefferson, in the State of Wisconsin, for the reason that this court has never acquired jurisdiction of the same.

WILLIAM RUGER,
Defendant's Attorney.

Motion to remand overruled and trial.

And being argued by the counsel of the parties and submitted, it is ordered by the court that the said motion be, and hereby is, overruled; and this day came the parties by their counsel, and the issue herein came on to be tried.

Whereupon a jury was called to try the same, who came, to wit, Alexander Rennie, Edward Elderkin, Frederick J. Brande, Isaac Loper, Matthew Scott, Clinton Matteson, David Ferguson, Charles H. Warner, George Rodgers, Thompson Richmond, James G. Henshall, and Edwin Reynolds, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled; and the trial not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the third day of said term, to wit, on the thirteenth day of April, A. D. 1870, the following proceedings were had, to wit:

Trial cont'd.

54 This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the fourth day of said term, to wit, on the fourteenth day of April, A. D. 1870, the following proceedings were had, to wit:

Verdict.

This day came the parties by their counsel, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid, being charged by the court, on their said oaths respectively do say that the defendant is guilty in manner and form as the plaintiff hath herein declared against it, and assess the damages to the said plainttff at the sum of five thousand dollars.

And came the defendant's counsel and moved the court for a new trial for reasons filed, which are as follows, to wit:

Motion for new trial.

Circuit court of the United States for the district of Wisconsin.

HENRY K. WHITON, AS ADMINISTRATOR OF THE estate of Mary F. Whiton, deceased,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

And now comes the defendant by William Ruger, its attorney, and moves the court now here to set aside the verdict, and grant a new trial herein for the following reasons:

1st. Because the court erred in admitting evidence, upon the part of the plaintiff, against the objection of the defendant, and in refusing to admit evidence offered upon the part of the defendant.

2d. Because the court erred in refusing to give the following instruction to the jury:

"Upon the pleadings and evidence in this action the plaintiff is not entitled to recover, and you will find a verdict for the defendant."

55 3rd. Because the court erred in refusing to give the following instructions to the jury:

"If the passing of the train of The Milwaukee & Prairie du Chien

Railway Company, immediately before the accident, and the delay in crossing, or temporary obstruction to her view caused thereby, so far contributed to cause the injury received by Mrs. Whiton that she would not have been injured except for the passing of such train as aforesaid, then the plaintiff cannot recover, even if the defendant was guilty of negligence which also contributed to cause such injury, and Mrs. Whiton was free from all negligence."

4th. Because the court erred in refusing to give the following instruction to the jury:

"If the freight train of The Milwaukee & Prairie du Chien Railway Company, in crossing Academy street, immediately before the accident, was running at an unlawful rate of speed, and this so far contributed to cause the injury to Mrs. Whiton that she would not have been injured except for such running at such unlawful rate of speed, then the plaintiff cannot recover, even if the defendant was guilty of negligence which also contributed to cause such injury, and Mrs. Whiton was entirely free from negligence."

5th. Because the court erred in refusing to give the following instruction to the jury:

"The plaintiff cannot recover unless the evidence shows that the defendant was guilty of some wrongful act, neglect, or default which caused Mrs. Whiton's death; and if either she, or The Milwaukee & Prairie du Chien Railway Company, its agents or servants, were also guilty of a wrongful act, neglect, or default which proximately contributed to cause the injury from which she died, and without which she would not have received such injury, the plaintiff is not entitled to recover."

Because the court erred in refusing to give the following instruction to the jury:

"To entitle the plaintiff to recover, it must appear from the
56 evidence that the defendant or its servants were guilty of some wrongful act, neglect, or default which caused, or contributed to cause, the fatal injury received by Mrs. Whiton, & that she exercised ordinary care to avoid such injury. Neither of these can be presumed. The plaintiff must prove the defendant or its servants guilty of some wrongful act, neglect, or default; that such act, neglect, or default caused, or contributed to cause, the injury; that Mrs. Whiton exercised such care to avoid injury as is usually exercised in like circumstances by persons of prudent and careful habits. And if the evidence leaves either of these things in doubt, the plaintiff cannot recover."

Because the court erred in refusing to give the following instruction to the jury:

"In view of the evidence, the defendant is not chargeable with any wrongful act, neglect, or default, if its servants in charge of the engine observed the statutory requirement as to ringing the bell before crossing Academy street; and if the evidence fails to show that it was not so rung, no fault can be imputed to the defendant."

Because the court erred in refusing to give the following instruction to the jury:

"Under ordinary circumstances, a person possessing the use of those faculties, should use both eyes and ears to avoid injury in crossing a railway track; and if in this case the wind and noise of the freight train

tended to prevent Mrs. Whiton from hearing the approach of defendant's engine, she was under the greater obligation to use her eyes. It was her duty to look carefully along the tracks of defendant's railway, both northwardly and southerly, before attempting to cross them, and it was not a sufficient excuse for failing to do so, that the day was cold & windy, or that one train had just passed on the track nearer to her."

Because the court erred in refusing to give the following instruction to the jury:

57 "It was the duty of Mrs. Whiton to look carefully along the tracks of defendant's railway to the north, before putting herself in the way of danger, and in time to see & avoid any engine or train approaching from that direction. If necessary, in order to do this, it was her duty to pause, before starting to cross, until the freight train had so far passed as to give a sufficient view to determine whether she could safely cross; and if she failed to look carefully along these tracks to the north after this freight train had so far passed as to give her such a view, and in time to have seen & avoided defendant's engine, the plaintiff cannot recover."

Because the court erred in refusing to give the following instructions to the jury:

"The evidence shows that it is about 29 feet from the westerly rail of the track upon which the freight train was moving and the westerly rail of that upon which the defendant's engine was backing, and if the deceased failed to wait for a reasonable opportunity & look northwardly along the tracks before starting to cross, or to look while passing over this space, she was guilty of negligence, & the plaintiff cannot recover."

Because the court erred in refusing to give the following instruction:

"If Mrs. Whiton saw defendant's engine in time to have easily avoided it, and made no attempt to avoid it, she was negligent, and the plaintiff cannot recover."

Because the court erred in refusing to give the following instruction:

"Under the pleadings and evidence in this action the plaintiff, if entitled to recover at all, cannot recover more than nominal damages."

Because the court erred in refusing to give the following instruction:

"This is an action to recover a monied compensation for the pecuniary injury and damage resulting to the plaintiff from the death of his wife, Mary F. Whiton, and nothing can be allowed for the mental anguish which the plaintiff has suffered, or for loss of the society of
58 his wife, or on account of the pain and suffering endured by her, or to punish the defendant."

Because the court erred in refusing to give the following instruction to the jury:

"The plaintiff cannot recover in this action for any pecuniary loss or injury which did not result from the death of the deceased, hence the expense of medical attendance, nursing, or any other expense incurred in consequence of the injury to the deceased, but not in consequence of her death, are not to be considered; neither can damages be given on account of funeral expenses."

Because the court erred in refusing to give the following instruction to the jury:

"The plaintiff, if entitled to recover at all, cannot recover in this action for any injury which may have resulted, or will hereafter result, from the death of their mother to the children of the said plaintiff and Mary F. Whiton."

Because the court erred in refusing to give the following instruction to the jury:

"Under the pleadings & evidence, the plaintiff, if entitled to recover at all, cannot recover on any ground except for loss of service of the deceased. In estimating the damages on this account, the value of her service over & above the cost of her maintenance is all that can be allowed; and if the cost of her maintenance would have been equal to or more than the pecuniary value of her services, the plaintiff cannot recover anything more than nominal damages."

Because the court erred in refusing to give the following instruction to the jury:

"The plaintiff cannot recover any damage in this action on account of the loss of the services of Mary F. Whiton subsequent to the date of the commencement of this action."

Because the court erred in refusing to give the following instruction to the jury:

"If the plaintiff is entitled to recover at all, he cannot recover
59 any damages on account of the loss of the service of Mary F. Whiton, except from the date of her death to the date of plaintiff's marriage with his present wife."

Because the court erred in refusing to give the following instruction to the jury:

"You cannot allow the plaintiff compensation for any item of loss or injury which you may suppose he has sustained by reason of the death of Mary F. Whiton, unless the evidence shows that such loss or injury has resulted, or will actually result, from such death to the plaintiff. You cannot indulge in conjectures, speculation, or guessing at the damages, but can allow only for such pecuniary injuries as the evidence shows have or will actually result to Henry K. Whiton from the death of his wife."

Because the court erred in refusing to give the following instruction to the jury:

"More care is required in passing such a railway crossing as that at Academy street than in crossing a common street or single railway track; and Mrs. Whiton should have exercised a degree of care proportioned to the danger—such a degree of care as is usually exercised in like circumstances by persons of careful & prudent habits; and if she failed to do so, the plaintiff cannot recover; or if by the exercise of such care she could have escaped injury, the plaintiff cannot recover."

Because the court erred in instructing the jury as follows:

"They therefore remained there until the freight train had passed beyond Academy street; then they attempted to cross the railroad track."

Because the court erred in instructing the jury as follows:

"And when the train was backing, as this train was, it was the duty—

the undoubted duty—of those who had the management of the train, to keep a lookout and see where their train was going."

60 Because the court erred in instructing the jury as follows:

"And, independent of this, it was also the duty of those who had the management of the train to have regard to the particular circumstances under which the train was placed" * * * * * * * * "the passing of the freight train in the opposite direction, which was calculated to obscure the view of any persons who might be standing at the crossing on the north side of Academy street; & therefore there was, I think, a peculiar vigilance incumbent on those who had the management of the switch train to ring their bell & keep a proper lookout." * * * * * * * * * "Another fact in determining the question of negligence, perhaps, on the part of the defendant, should not be lost sight of; and that is, the character of the weather at the time, the wind which was blowing, and the violence with which it blew. It was blowing from Academy street towards the train & not from the train towards Academy street. That was a circumstance—if it was a violent wind, such as was calculated to affect the sound of the approaching train or of the bell—which should have induced to increased watchfulness on the part of those having the management of the train." * * * * * * * * * "But it certainly was the duty of those who had the management of that engine to see where the train was going, & not to rush recklessly and blindly along the railroad track through a populous town."

Because the court erred in instructing the jury as follows:

"The main point is, Was the bell rung, as the train approached Academy street, so as to give warning to any persons who might be on that street & might want to cross, and was it kept ringing up to the time that the tender and engine crossed the street?" * * * * * * * *

61 "If, in point of fact, gentlemen, the bell of this engine was not rung by those who had the management of the train, so as to give warning in sufficient time to any persons who might wish to cross the track at Academy street, there can be no doubt that it was an act of negligence on the part of those who had the management of the train." * * * * * * * "The bell should be rung—for instance, the switch train was approaching Academy street—the bell should be rung in sufficient time before the train reached Academy street to give warning to any persons who might be wishing to cross the track at Academy street, and should be kept ringing up to the time that the tender reached the street, and, I think, until the tender crossed the street."

Because the court erred in instructing the jury as follows:

"The account which they gave at the coroner's inquest has been given in evidence before you, & if that is correctly stated, it does not conform in all respects to their statements now given before you, and it is for you to say how far their statements, made before the coroner's jury, may affect their testimony here.

Because the court erred in instructing the jury as follows:

"To say that under all circumstances & on all occasions it is the duty of persons so crossing a railroad track upon a public street to stop & take a look up and down the track deliberately, is not what the court can say is a rule of law." * * * * * * * "The only rule, I think, that we can lay down applicable to such a case as this is the follow-

ing: that Mrs. Whiton was required to exercise that degree of prudence, care, & caution incumbent on a person possessing ordinary reason and intelligence under the special circumstances of the case, having reference to the fact of its being a railroad crossing; also,
62 the fact that she, in company with her friend or companion, had stopped in order to enable another train to pass by on a track of the railroad; also, to the circumstances under which she was placed at the time. All that can be required is, I think, ordinary prudence, care, & caution." * * * * * * * "It was natural that, as soon as the obstacle in their way was removed, *that* they should attempt to cross." * * * * *

"And suppose it was their duty to look up & down, as the freight train had passed, did they see the switch train? We do not know. And if they saw it; if they glanced round, as perhaps would be ordinarily true, or might be of persons in crossing—a mere glance around, not a fixed view on an object, but a mere glance—if they glanced around and saw the engine, what was the conclusion? What was the inference? We do not know. We cannot tell whether they saw it, or what conclusion they may have drawn from its sight—whether it was moving or standing still—moving one way or another; we do not know. It is certain, if they saw it, that it was *there* duty to try and escape contact with it." * * * * * * * "That is to say, if from what they saw they could infer the train was about to cross Academy street. Of course, a different rule might follow if they supposed the train was standing still, or was moving in the opposite direction. They are to be judged of by the impression made upon their minds at the time. * *

"I think you ought to bear in mind also, as having some weight upon your conclusions upon this subject, the fact that the person killed was a woman; that Mr. Rice, the witness who has testified before you, was also waiting, & passed on."

Because the court erred in instructing the jury as follows:

"The only effect of the passage of this freight train on the M. & P. du C. track, I think, is this: that it ought to have had an influ-
63 ence, & had an influence, on the conduct of the parties." * * *

"I don't think the fact that the train was running at a greater speed than was warranted by law can have any other effect than that it might have modified the rule, and undoubtedly did modify the rule, which will be applicable to the various parties, &, as I have already said, on the part of those having the management of the switch train to a greater watchfulness, to a stronger necessity of ringing the bell, because the movement of the freight train would naturally create more or less noise, & consequently a greater necessity of giving the proper warning of the approach of the switch train to Academy street. Also, perhaps, it should have its influence upon those who were standing at the crossing."

Because the court erred in instructing the jury as follows:

"And the supreme court has said that it is a matter largely resting with the sound reason and discretion of the jury, taking all the facts & circumstances into consideration, the qualities, the personal qualities," &c.

Because the damages assessed by the said verdict are excesive, and in assessing the same the jury departed from and disregarded the instructions of the court.

Because of newly-discovered evidence, as shown by the affidavit of William Ruger, hereto annexed.

Because the said verdict is contrary to law, and is not sustained by, but against, the evidence.

WILLIAM RUGER,
Defendant's Attorney.

Circuit court of the U. S. for the district of Wisconsin.

HENRY K. WHITON, AS ADM'R OF THE ESTATE of Mary F. Whiton, deceased,
against
THE CHICAGO & NORTHWESTERN RAILWAY Company.

STATE OF WISCONSIN, *Rock County, ss :*

64 William Ruger, being first duly sworn, deposes and says that he is the attorney for the defendant in the above-entitled action; that said defendant is a corporation having its principal office and place of business without this State; that said action is founded upon sections 12 & 13 of chapter 135 of the Revised Statutes of the State of Wisconsin, and brought to recover damages on account of the pecuniary injuries resulting to the above-named plaintiff from the death of his late wife, Mary F. Whiton, caused, as charged, by the wrongful act, neglect, or default of said defendant; that, as a defence to said action, the defendant charged that said Mary F. Whiton, deceased, was guilty of negligence, which directly contributed to cause her death, and without which she would not have received any injury whatever; that said action was tried at the present term of this court, at the court-room, at the city of Milwaukee, on the 12th, 13th, & 14th days of April, A. D. 1870, and a verdict rendered therein for the plaintiff for five thousand dollars. And this deponent further says that Lyman J. Barrows, of the city of Janesville, in said county and State, can testify to the following facts: That he saw said Mary F. Whiton within ten or fifteen minutes after she received the injury from which she died, and said to her, "Why, Mrs. Whiton, how did this happen?" and that she replied, "I did not hear the bell;" and deponent saith that he prepared & presented to said Barrows the affidavit hereto annexed & marked "A," and that said Barrows read the same, and said it was all true, but said Barrows declined to sign the same or make his oath to the matters therein stated, and declines to give to the defendant any affidavit stating the facts therein set forth, or any of them. And deponent saith that said Barrows said to deponent that Mr. Conger requested him not to give such affidavit; and further saith that, a few days prior to the trial of this action aforesaid, deponent asked said Barrows whether Mrs. Whiton said
65 anything to him, when he saw her as aforesaid, immediately after she received such fatal injury, in regard to the cause of the happening of the accident and receipt of such injury, and that said Barrows replied that she did not, or that he did not recollect that she did. And deponent saith that such evidence has been discovered since the said trial, and was not previously known to this deponent to exist, and that the same is material to the defendant, as this deponent verily believes. And deponent further saith that the matters and facts herein stated are better known to deponent than to any officer of the defendant corporation; that such matters & facts are all within the personal knowledge of deponent, and are not, as deponent believes, known to any officer of

the defendant. Wherefore this affidavit is made by deponent, and not by any of such officers.

WILLIAM RUGER.

Subscribed & sworn to before me this 20th day of April, 1870.

EDW. KURTZ,
Clerk U. S. Circuit Court, Wis.

U. S. circuit court, district of Wisconsin.

HENRY K. WHITON, AS ADM'R OF THE ESTATE of Mary F. Whiton, deceased,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company.

STATE OF WISCONSIN, *Rock County, ss:*

Lyman J. Barrows, being first duly sworn, deposes and says that, immediately after Mary F. Whiton, now deceased, received the fatal injury referred to and described by this deponent on his examination as a witness on the trial of the above-entitled cause, he went to the house of one Mrs. Burns, where the said Mary F. Whiton then was, and then and there saw her, and asked her, in substance, how she came to receive such injury, addressing her, as deponent believes, as follows, to wit: "Why, Mrs. Whiton, how did this happen?" and that she then and there answered, "I did not hear the bell;" and deponent saith that he believes that said conversation occurred within ten or fifteen
66 minutes after said Mary F. Whiton received such fatal injury; and deponent further saith that, a few days previous to the aforesaid examination of this deponent as such witness, he had a conversation with William Ruger, attorney for the defendant in the foregoing entitled cause, and was then asked by said Ruger whether Mrs. Whiton said anything to deponent when deponent saw her as aforesaid, immediately after she received such fatal injury, in regard to the cause of the happening of the accident and receipt of such injury; and deponent did not then recollect the conversation with her before stated, or that she said anything at the time aforesaid as to the cause of such accident and injury, and so informed said Ruger.

And afterwards, to wit, on the eleventh day of said term, to wit, on the twenty-second day of April, A. D. 1870—present, both the Hon. Tho's Drummond, circuit judge, and Hon. A. G. Miller, district judge—the following proceedings were had, to wit:

Motion for new trial argued.

This day came the parties by their counsel, and the motion of the defendant for a new trial came on to be heard, and was argued by the said counsel, when the court held the same under advisement.

And afterwards, to wit, on the eighteenth day of said term, to wit, on the thirtieth day of April, A. D. 1870, the following proceedings were had, to wit:

Motion overruled and judgment.

This day came the parties by their counsel, and, on consideration of the motion of the defendant for a new trial, it is ordered by the court

that the said motion be, and hereby is, overruled. Whereupon it is considered and adjudged by this court now here that the said plaintiff have and recover of the said defendant, The Chicago & Northwestern Railway Company, the sum of five thousand dollars damages, so as aforesaid assessed by the jury, together with one hundred and fourteen dollars, his costs about his said suit in this behalf by him expended; and that he have execution therefor.

Judgment roll signed April 30th, 1870.

67 EDWARD KURTZ, *Clerk.*

Damages	$5,000 00
Costs	114 00
	$5,114 00

Judgment roll filed April 30th, A. D. 1870, at 5 o'clock p. m.

EDWARD KURTZ, *Clerk.*

MAY 6, 1870.—This day came Oliver B. Ford and Orrin Guernsey, of the city of Janesville, in the county of Rock, and State of Wisconsin, and filed their bond in the penalty of ten thousand dollars, conditioned that the defendant shall prosecute a writ of error to effect, and answer all damages and costs if it shall fail to make good its plea; which bond is approved by the court, and is as follows:

Bond for supersedeas & costs on writ of error.

Circuit court of the United States for the district of Wisconsin.

HENRY K. WHITON, AS ADMINISTRATOR OF the estate of Mary F. Whiton, deceased,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY Company.

Judg't April 30, 1870.
Damages, $5,000 00.
Costs,

Know all men by these presents that we, Oliver B. Ford and Orrin Guernsey, of the city of Janesville, county of Rock, and State of Wisconsin, are held and firmly bound unto the above-named Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, in the sum of ten thousand dollars, to be paid to the said Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seales, and dated this 5th day of May, A. D. 1870.

Whereas the above-named The Chicago & Northwestern Railway Company hath prosecuted a writ of error to the Supreme Court
68 of the United States, to reverse the judgment rendered in the above-entitled suit on the 30th day of April, A. D. 1870:

Now, therefore, the condition of this obligation is such, that if the above-named The Chicago & Northwestern Railway Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

O. B. FORD. [SEAL.]
ORRIN GUERNSEY. [SEAL.]

DISTRICT OF WISCONSIN, *ss:*

Oliver B. Ford and Orrin Guernsey, being severally duly sworn, each for himself deposes and says that he is a resident and freeholder of the county of Rock, in the State of Wisconsin; that he is worth the sum of ten thousand dollars, over and above all his debts and liabilities, in property not by law exempt from execution, and owns real estate in his own name in said State of the value of ten thousand dollars, over above all his debts and liabilities.

O. B. FORD.
ORRIN GUERNSEY.

Subscribed & sworn to before me this 5th day of May, A. D. 1870.
GEO. R. PECK.
Commissioner of the United States Circuit Court for Wisconsin.

MAY 6, 1870.—Approved by the court.

A. G. MILLER,
District Judge.

Whereupon it is ordered by the court that execution be superseded, and thereupon a writ of error and citation issued, and a copy of the writ of error lodged for defendant in error.

Citation returned.

We accept service of above citation this 12th day of May, A. D. 1870.
CONGER & SLOAN,
Pl'ff's Att'ys.

MAY 9, 1870.—This day the opinion of the court on overruling motion for new trial filed, as follows:

69 *Opinion of the court.*

Wisconsin circuit court United States, April, 1870, Milwaukee.

HENRY K. WHITON, ADMINISTRATOR, &C., OF Mrs. Whiton,
v.
THE CHICAGO AND N. W. R. W. CO.

It is due to the zeal and ability of the defence in this case, as well as because of the giving of certain instructions and the refusal of others by the court, that the reasons why a new trial is refused should be briefly stated.

This is an action, under the statute of this State, brought by the plaintiff for the death of his wife, caused by the alleged wrongful act of the defendant.

Mrs. Whiton and Mrs. Woodward, in December, 1864, resided near each other on Bluff street, in Janesville, in this State. One morning, near Christmas of that year, they left home, and proceeded along the north side of Bluff street until they reached Academy street. They then turned south, on the west side of Academy street, until they arrived at the railway crossing. At that time there were four tracks crossing Academy street on the same level, extending northeast and southwest, the street there running about north and south. The two most northwesterly tracks belonged to the Milwaukee and Prairie d

Chien Railroad, and the other two to the defendant. When they arrived at the railroad crossing, a freight train was passing the street in a northeasterly direction on the south track of the Milwaukee and Prairie du Chien Railroad at a rate of speed unauthorized by the law of this State.

Mrs. Whiton and Mrs. Woodward therefore stopped until the freight train had passed. Standing there with them, also waiting for the freight train, was Mr. Jacob C. Rice, the sole surviving witness of what immediately occured. It was about ten o'clock. The morning was quite cold, with a very strong wind blowing from the southwest. There was some snow falling at the time, and there were a few snow piles
70 lying near the tracks, apparently previously thrown off the tracks. While the freight train was going up the track, a switch train was backing down, in a southwest direction, on the south track of the defendant, the tender coming first, then the engine, and next a freight car attached to the engine. Mr. Rice was standing very near the freight train as it crossed Academy street, and, as soon as it passed, he instantly, with a quick step, crossed over the railroad tracks; and, after having crossed the tracks a rod or so, he heard a scream, turned round, and saw that Mrs. Whiton and Mrs. Woodward had been struck by the tender of the switch train. Mrs. Woodward was almost instantly killed, and Mrs. Whiton, after lingering a few weeks, died from the effects of the injury. As Mr. Rice crossed, he "cast his eye at the track," and saw nothing in the way, and so passed on till he was arrested by the cry of the ladies. He did not see the switch train before or as he crossed, and heard no signal or bell from that train. The questions submitted to the jury were:

1st. Whether Mrs. Whiton's death was caused by the negligence of those who had the management of the switch train? and—

2d. Was Mrs. Whiton herself guilty of any fault or negligence which contributed to that result?

And the jury having found negligence in the defendant, and none in Mrs. Whiton, the question is, whether there is any error of fact or law to prevent judgment on the verdict. We think there is not.

In looking through the various objections made by the defendant to the rulings of the court in receiving or rejecting testimony on the trial, we see nothing decided erroneously against the defendant material to the issue; and we think, under the facts of the case, it would have been error for the court to instruct the jury, as requested by the defendant, that the plaintiff could not recover.

As to the negligence of the defendant, the court, in substance, instructed the jury that it was the duty of those having the man-
71 agement of the switch train to cause the bell of the engine to be rung a sufficient time, before crossing Academy street, to give warning to any passengers on that street desirous of crossing, and to keep it ringing till the tender had crossed the street; and also that it was the duty of those having the management of the train to keep a proper lookout in the direction the train was moving, and particularly under the circumstances of the case—a freight train going up one of the tracks, the switch train just approaching a much-frequented street, and a violent southwest wind blowing at the time.

As to the negligence of Mrs. Whiton, the court, in substance, instructed the jury, that she was required to exercise that degree of prudence, care, and caution incumbent on a person possessing ordinary reason and intelligence, under the special circumstances of the case, having regard to the fact of its being a railroad crossing, and another train cross-

ng the street, for which she had to wait in company with Mrs. Woodward. She must have used ordinary care, prudence, and caution.

The court declined to say to the jury how she must dispose of her limbs, her eyes, or her ears, but left it to the jury to find whether she had been guilty of any fault which contributed to her death; and if she had, said the plaintiff could not recover even if the defendant had been guilty of negligence.

The court also told the jury, before they could find a verdict against the defendant, they must be satisfied its employees were guilty of negligence, and that such negligence caused her death. As to the damages, the court instructed the jury that they could give nothing for feeling, sympathy, or mental suffering, but that they were restricted to the rule of pecuniary injury alone, resulting from the death of Mrs. Whiton, to the plaintiff; that it was almost impossible to lay down any fixed rule on the subject; that it largely rested in the sound reason and discretion of the jury, taking all the facts of the case into consideration—
72 her personal qualities, her ability to be useful and to earn money.

This is the general aspect of the case.

It may be proper now to advert to some of the objections taken to the rulings of the court in the instructions given and refused.

There were several instructions asked, which proceeded on the assumption that the fault of the freight train (in moving too fast) on the Milwaukie and Prairie du Chien track proximately caused the death of Mrs. Whiton. The instruction given on this point was, that the only effect of the freight train being there under the circumstances mentioned was to modify or influence the conduct of those on the switch train and of Mrs. Whiton; and, consequently, the court considered the fault of the freight train, as connected with the death of Mrs. Whiton, too remote in law to constitute a proper element in causing her death. We see no reason to change this opinion. Undoubtedly it may be said, if the freight train had not been there, Mrs. Whiton would not have been killed; so she might have escaped if Mrs. Woodward had not been with her, or if they had not followed directly after Mr. Rice. It is insisted that if the bell of the switch train were rung for some time before, it need not have been up to the time of crossing the street. The object of ringing the bell is to give warning. The passengers in this case were on the west side of Academy street; a freight train shut out the view of the switch train; as long as there was risk of encountering passengers, the bell should have been rung to attract their attention.

Many instructions requested by the defendant were to this effect: That it was the duty of Mrs. Whiton, before attempting to cross the track, to look carefully up and down, to see what obstacle was in the way, and even to stop for that purpose, and if this were not done, it was negligence.

The court instructed the jury that Mrs. Whiton must have ob-
73 served due care and caution and prudence. These imply needful and usual foresight and watchfulness. We are not prepared to say that every person who, in a populous town, at a railroad crossing, in walking on a street, shall fail to pause and look along the track, is guilty of such negligence as to prevent a recovery for an injury inflicted by the flagrant wrong of those on a passing train. We have to take men and women as they are, and judge of them by their conduct under such circumstances. What, if the reason the person does not look up or down the track is, that the bell of the engine is not rung? And can an engine be permitted to run recklessly over passengers, because if they do not get out of the way they are in all cases guilty of contribu-

tory negligence? The very object of ringing the bell is to attract attention. It will often happen, as indeed observation proves, that persons walking over a railroad track on a public street of a town will be more or less preoccupied, and those who control so powerful an instrument of destruction as a locomotive in motion are required to ring the bell to make them watchful. It will be found, on examination of the cases in those courts which do not permit a recovery where there has been any fault whatever on the part of the person injured, that they are very much influenced by the conduct of the other party. If the wrong is flagrant, they are inclined to hold that to be the cause of the injury. A very striking illustration of this is to be seen in two cases recently decided in England in the court of exchequer, the one following the other in the same volume of reports. In the first, the railway company was thought free from fault, and the rule as to contributory negligence by the deceased was stated with some stringency; but in the second, where the railway company was guilty of negligence, it was held the case was properly left to the jury, although the evidence
74 showed the deceased, as he crossed the track, was looking down on the ground.

In fact, while there are some things about which all intelligent men agree, and as to which it might be the duty of a court to charge that they constituted negligence, yet there are many others where the court must leave it to the jury to decide whether or not negligence is established, and therefore it is by no means uncommon to find a court, in the same charge to a jury, declaring that, if a certain fact exists, it is negligence, and if another, that it is for the jury to determine. And this must be so as long as negligence in any of its bearings is a mixed question of law and fact.

The court instructed the jury in this case, if the bell of the engine of the switch train was not rung, so as to give warning to Mrs. Whiton, it was negligence, and the court refused to instruct the jury that she had been guilty of negligence, but left that to the jury to determine.

We think this was correct, and we see no reason for disturbing the verdict on the ground that on either point it was not warranted by the evidence. We think the testimony indicated that the bell of the engine was not rung as it approached Academy street, so as to give warning to those on the street. Neither the engineer nor the fireman saw Mrs. Whiton or Mrs. Woodward before they were struck by the tender; they therefore were not on the lookout for the street.

As to the negligence of the employees of the defendant in the conduct of the switch train, there can be no doubt the finding of the jury was warranted by the evidence. Of the conduct of Mrs. Whiton at the moment we know nothing, except what may be inferred from the result. No living witness, so far as we know, saw her from the instant that she moved to cross the tracks until she was struck. We do not know whether she glanced along the track or saw the switch train; and, if she did, we are ignorant of the impression made on her mind. Whether she thought it moving or standing still, we cannot tell. She had to
75 pass over about thirty feet—probably a little farther—from the spot where she stood waiting for the freight train to cross until she reached the track on which the switch train was moving. What was seen or heard in that brief time by Mrs. Whiton is very much matter of conjecture. The chances are that she and Mrs. Woodward follow Mr. Rice immediately, and while he, walking faster, escaped, they were killed. Now, if the bell had been ringing as they started, what would have been its effect on them? This, we think, as well as the

other facts connected with her conduct, were properly left to the jury to decide.

It is also claimed by the defendant that, since the trial, it has been ascertained that Mrs. Whiton, while on the spot, and very soon after the accident, said she did not hear the bell, and inference is thence sought to be drawn that she did not see the switch train.

The plaintiff offered to prove the declarations of Mrs. Whiton, and the defendant objected; and they at the time were excluded, subject, however, to the right, on the part of the plaintiff, to have the matter reconsidered. The opinion of the court on this point was not subsequently taken, and therefore the ruling stands as made on the objection of the defendant. We think it would be something unusual to grant a new trial to a party for the reason that the court had not admitted testimony excluded at his instance. We are inclined to think the declarations were competent evidence, but we do not see how their exclusion injured the defendant. If the proof had been admitted, it seems to us that, to say the least, it would have operated quite as much against the defendant as otherwise.

Objection is made to an inadvertance of the court in commenting on the testimony of two of the witnesses, the switchman and the engineer, in saying that the account which they gave at the cor-
76 oner's inquest, if correctly reported, did not conform in all respects to their testimony in court; but this was referred to only incidentally, and its effect was left to the jury. In fact, only one of the witnesses testified before the inquest; and the contradiction of the other, if any, arose from the statement of a witness as to representations made to him. No doubt, the jury corrected the mistake at the time, and we think it could not, in any event, be prejudicial to the defendant. It was manifest, when comparing the other testimony in the case bearing on the conduct of the engineer, switchman, and fireman, with their own evidence in court, that they were by no means confident the bell had been rung at the time. It is in that respect mainly that the inadvertance of the court could have any effect; and, in fact, we think it had none; and, besides, if the attention of the court had been called to it at the time by counsel, it would have been corrected at once. It is also objected that, in speaking of the acts of Mrs. Whiton and Mrs. Woodward to the jury, the court said that "they remained there (at the crossing at Academy street) till the freight train had passed beyond that street." If this word was in fact used, the obvious meaning was "till the freight train had passed by the street." No notice was taken of this at the time by the counsel, and now the objection seems hypercritical.

Various instructions were requested upon the subject of damages, all of which were refused, and the jury instructed as heretofore stated. It is confessedly a most dificult matter to deal with, and, from the nature of the case, does not admit of any fixed rules. The statute itself, while confining the recovery to the pecuniary injury resulting from the death, does not specify in what it shall consist. The jury, in this case, found the highest sum allowed by the law, five thousand dollars; and though the testimony bearing in this branch of the case was quite inde-
77 finite, yet it showed clearly that Mrs. Whiton was a superior woman, as wife, mother, and member of society. And though the court might not, as to the extent of the pecuniary injury, agree with the jury, yet there is nothing in the amount of the verdict to authorise the court to interfere on that ground.

(End of opinion.)

JUNE 6, 1870.—Bill of exceptions signed and filed, as follows:

Bill of exceptions.

Circuit court of the United States for the district of Wisconsin.

HENRY K. WHITON, AS ADMINISTRATOR OF the estate of Mary F. Whiton, deceased,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company.
} Bill of exceptions.

Be it remembered that afterwards, to wit, on the 13th day of April, A. D. 1870, before the Hon. Thomas Drummond and the Hon. Andrew G. Miller, judges of said court, comes as well the said plaintiff by Messrs. Conger & Sloan, his attorneys, as the said defendant, by H. L. Palmer & William Ruger its attorneys; and a jury being called, elected, tried, & sworn to try the several issues above joined, the plaintiff, by his counsel, offered to introduce evidence to sustain the said issues upon his part, and thereupon the said defendant, by its counsel, objected to the introduction of any evidence in the cause for the reason that the declaration therein does not set forth any cause of action; which objection the court then & there overruled, and the defendant, by its attorneys, to the said ruling & decision then & there excepted.

And the trial of said cause proceeding, it was proved that Henry K. Whiton, the plaintiff, was the husband of Mary F. Whiton, deceased; that her death resulted from an injury received on the most southeasterly track of defendant's railway, at its intersection with the sidewalk, on the westerly side of Academy street, Janesville, Wisconsin, by a collision with defendant's tender & engine, Dictator. It was also
78 proved on the trial that the accident occurred about 11 o'clock a. m. on the 23rd of December, 1864; that the day was very cold & blustering, with a strong wind blowing from the southwest. It was also proved on the trial that the deceased was a woman in the prime of life, in good health, robust, active, & energetic, & in the full possession of her senses of sight and hearing; that she was the mother of two boys, one about 11 years of age, the other about five. It was also proved on the trial that the crossing at Academy street was a public street used very extensively by residents living in that part of the city, & that the tracks there were also very much used by engines & trains passing & repassing & in switching & making up trains, & that, in switching, the engines & trains necessarily moved backwards as often as forwards. It was also further proved on the trial that the engine which caused the injury was previously, & at the time of the accident, moving at the rate of 4 or 5, if not exceeding 5 miles an hour.

And the plaintiff further, to maintain the issues upon his part, called as a witness—

LYMAN J. BARROWS, who testified as follows:

I am a physician. Immediately after the accident I was called to see Mrs. Whiton. Was there perhaps within 10 or 15 minutes. Her right foot was somewhat crushed & mangled—foot & ankle. I saw Mrs. Whiton again the same day in the course of 2 or 3 hours. She then underwent the operation of amputation of her foot. She lived about five weeks.

Question. What was her character in regard to her intellectual capacity & acquirements?

(To this question the defendant by its counsel objected as calling for incompetent & immaterial testimony, and because it called for proof of special damages when no foundation had been laid in plaintiff's declaration for proof of such damages, or for any damages recoverable in this suit, except loss of services; which objection the court then & there overruled, and the defendant by its attorneys to the said ruling
79 & decision then & there excepted, and said witness proceeded to testify as follows:)

She was a woman of fine intellectual culture, a superior wife, mother, & member of society in every respect.

Mrs. Whiton's house is on Bluff street, & is designated as "Whitons" on the map. The route from Mrs. Whiton's residence to the place of the accident was by a cross-walk to the northerly side of Bluff street, then passing down on the northerly side of Bluff street to the west side of Academy street; thence southerly on the west side of Academy street. There was no walk on the southerly side of Bluff street or easterly side of Academy street. The ground at Mrs. Whiton's residence was higher than at the crossing of these tracks. There was quite a hill there. The roof of a house standing down on the tracks would be perhaps down below the top of the hill. I should think the view of the crossing would be clear from the time you reached a point within 6 rods of the intersection with Academy street. Mrs. Whiton had resided there from 7 to 9 years; am not positive. As you are crossing the tracks, when there are no cars on the tracks, the view is plain both to the north & south up & down the tracks. There are no permanent obstructions in that neighborhood; there were none at that time. The ground was level & plain both ways. I remember the sign-board there at this crossing, on the northwest side. It said, "Look out for the cars."

Question. Was it customary & usual for those switch engines to be standing still about those tracks in the vicinity of that crossing?

(To this question the defendant, by its counsel, objected as calling for improper & immaterial testimony, the general conduct of the defendant not being in question, & there being no proof of such an obstruction there at that particular time; which objection the court then & there overruled, & the defendant, by its counsel, to the said ruling & decision then & there excepted.)

Answer. It is customary for them to be there in the vicinity of that crossing day & night. I think it was so before & about the time
80 of this accident. It is impossible to cross there with a team more than half the time with a horse that is at all afraid of the cars. Persons crossing there about that time & prior to the accident frequently saw switch engines standing on the tracks.

And said plaintiff called as a witness—

JOSEPH B. WHITING, who testified in substance as follows:

Am a practicing physician & surgeon. I was called to attend Mrs. Whiton after injury.

(Counsel for the defendant here admitted that the death resulted from this injury.)

Question. Was Mrs. Whiton pregnant at the time?

(To this question the defendant, by its counsel, objected as improper & immaterial; which objection the court then & there overruled, & the

defendant, by its counsel, to the said ruling and decision then & there excepted.)

Answer. She was.

Question. What was her character in respect to intellectual capacity, moral & domestic habits?

(To which question the defendant, by its counsel, objected as incompetent & immaterial; which objection the court then & there overruled, and the defendant, by its counsel, to the said ruling & decision then & there excepted.)

Answer. She was a woman of fine capabilities, whether natural or acquired. She was a woman of high standard. She was domestic, exceedingly so, in her tastes & habits; devoted herself to her family, & seeking her enjoyment at her own home in a remarkable degree.

Cross-examination:

The witness said:

Mr. Whiton had the appearance of being in easy circumstances, living comfortably. Mr. Whiton has since married. I am slightly acquainted with his present wife. Mr. Whiton's family was broken up by the death of his wife on this occasion.

And the said plaintiff called as a witness—

O. W. NORTON, who testified in substance as follows:

In 1864 I occupied a warehouse near the track of the defendant's railway, in Janesville. I should think it was correctly located on the map. (Exhibit "A.") The tracks on the easterly side, represented by
81 red lines, belonged to the defendant, & the others to the Milwaukee & Prairie du Chien Railway Company. I saw the engine Dictator that morning. They came into the switch from High street, & hitched on a car at my warehouse. They coupled the car to the front part of the engine, and backed out upon this track that ends at my warehouse to a switch a few rods west of *the* High street. I came from my warehouse & stood on the platform of Bump & Gray's warehouse. As the engine left the switch, or about at the switch, I heard a loud conversation—loud talking by the switchman Jo., & Tom Sheridan, who was on a wagon, off some little distance to the right. The engine was then moving in a southwesterly direction. During that conversation, I don't think the engine had passed the switch over a rod or so. I directed my attention to this conversation. While it was going on another train came along there rapidly, on the track of the Milwaukee & Prairie du Chien road, going to the northeast, making a very loud noise, ringing the bell loud. It seemed to me to be making a very great noise, so much so that it drowned the conversation entirely from the boys on the engine & on the ground. When it came along I heard no more, & stepped into the warehouse, & immediately came out, looked down the track, & saw these women on Academy street. One appeared to be standing up, the other lying or sitting down. I could see the trimmings on the bonnet fluttering in the wind. I saw the boys coming from the engine. The engine was on beyond several rods & stopped when I saw it.

Question. When this switch engine was moving southwesterly from this switch, was there any bell rung upon it?

(To this question the defendant, by its counsel, objected as calling for immaterial & incompetent testimony, as it was not at the place referred to that the law required the bell to be rung; which objection the court then and there overruled, and the defendant, by its counsel, to the said

ruling & decision then & there excepted; and said witness further testified as follows:)

82 After the engine left the switch, the switchman, Jo., stepped upon the step of the engine; then this conversation happened with Jo. talking to this man, which I was listening to. Perhaps they did not move over a rod, it was so very slow; then this other train came along. This point of time I was very positive no bell was rung. I was listening to the conversation. When it was fresh in my recollection, I thought there was no bell rung. I think so now. That is the point where the ladies were injured, on the most southeasterly track crossing Academy street. (See point indicated on the map.) The ladies came down Bluff street to this point. Janesville was a city of 8,000 or 10,000 inhabitants at this time. It seems to me as though this Milwaukee train was running 12 or 15 miles an hours; it seems to me that it was running three times as fast as this little engine was, and a little more. From a distance of six rods from the intersection of the sidewalk with Academy street you could overlook the crossing. I had a plain view on this occasion, down along the tracks, from Bump & Gray's warehouse. After the Milwaukee train passed, there were no cars or anything upon these tracks up as far as Bump & Gray's warehouse. That Milwaukee train wouldn't obstruct the view; it didn't obstruct my view. After the Milwaukee train had passed, there could not have been anything to obstruct the view of a person crossing Academy street there, up along the tracks to the northerly, as far as the switch and Bump & Gray's warehouse. The ground along between the tracks is nearly level with the ties. A person standing close to the tracks on the northwesterly side would not be on any elevation. Evidently, I could not hear the bell against the wind; but in the winter season, when there is frost in the bell, it is said they cannot hear them so far. I think that is true. I

83 didn't hear any bell. I don't think there was any rung at that point of time, on account of the attention I was giving. I heard a bell ringing when this other freight train came along up & prevented my hearing that conversation.

And thereupon the plaintiff called as a witness—

JACOB C. RICE, who testified in substance as follows:

I was going down Academy street, & this freight train was passing there on the second track, I think. It was passing the crossing when I reached there. The engine had got by. Mrs. Whiton & Mrs. Woodward came up. We stood there until the train passed. I then started along & passed the other tracks. As I got past the tracks I heard a scream. I looked around, & first saw a glimpse of the woman knocked down. I might have been something like a rod from the last track when I heard this scream. The engine passed over Mrs. Woodward. Mrs. Whiton was knocked off. Then I looked for help. I saw nobody, but the hands appeared to be out of the train that had just passed over her. They came up & took Mrs. Woodward & carried her in. It was a very short time that myself & the ladies stood at the crossing waiting for this freight train to pass east. It might have been a minute or more. When it passed, I immediately stepped forward & crossed. I started on a quick step. I thought I would not be in their way. I think I heard no more of them till I heard the scream.

Question. Did you hear any bell or any signal given from this engine that struck the ladies?

(To this question the defendant, by its counsel, objected as calling for

incompetent & immaterial testimony, as the law required no other signal than the ringing of the bell, & only required the bell to be rung before crossing the street, whereas this engine was, at the time in question, in the act of crossing; which objection the court then & there overruled, and the defendant, by its counsel, to said ruling and decision then & there excepted.)

84 Answer. I heard no bell or no signal. I saw nothing. I looked as that freight train passed. I cast my eye, & saw nothing in the way, & I proceeded on; saw & heard nothing—no warning at all. I crossed the track immediately after this freight train passed along—instantly. I took a look at the tracks as I passed. I looked, of course, where I was going. I have no particular recollection whether I looked up & down the tracks. I looked forward. At the time I started to cross I stood right by the ladies. I did not see this switch engine at all. I am now about 72 years old. As I stood there waiting for this long freight train to pass, I was close to it, almost close enough to touch it. The bell of the long freight train was ringing. I wouldn't be sure, but it strikes me Mrs. Whiton had a veil on.

And thereupon the plaintiff called as a witness—

THOMAS SHERIDAN, who testified as follows:

I was at the depot the day Mrs. Whiton was hurt. I saw the engine, tender, & one car along about the switch. I stopped & asked the switchman about a wheat car. When talking with the switchman I was standing in my wagon. He was standing on the steps of the engine. My wagon was standing still, probably less than 3 rods from the switch. The switchman spoke to me from the switch, when he got on while I was there. I think it had passed down 2 or 3 rods beyond where my wagon was standing.

Question. Was there any bell rung upon the engine while you were there?

(To this question the defendant, by its counsel, objected for the reason that the law didn't require the bell to be rung at that place; which objection the court then & there overruled, and the defendant, by its counsel, to the said ruling and decision then & there excepted.)

Answer. I aint heard no bell rung at all. I think the fireman & engineer were inside of the cab of the engine. The tender was between them & the track back of them. The switchman stepped on the

85 south side of the engine. I didn't take notice as to the ringing of any bell upon any engine then. I didn't take notice to any other bell. When the conversation ended, I started to the northeast, and took no further notice of this engine till after the accident. My attention was called to the fact as to whether the bell was rung on this engine, the Dictator, immediately after the accident, by a man coming from the northeast on the track as I came on it. He said to me, "Did they give any alarm?" The first man that spoke to me was Fred. Curtis.

And thereupon the plaintiff called as a witness—

SANFORD A. HUDSON, who testified as follows:

I was at the place of this accident in a very few minutes after it occurred. I looked over the ground where it occurred. At that time there had been some considerable snow, & the men had shoveled it from the track along on the side, so that it formed ridges between the tracks; also it had been shoveled from the cross-walk; so there were ridges or piles of snow laying alongside of the tracks—well, I should think a foot

& a half high certain, perhaps more; some places I think, perhaps, it was two feet. I could stand upon the crossing at Academy street, &, looking up the track, could have seen a car or train of cars anywhere between the crossing & Norton's warehouse. I think the bell on this engine is smaller than on an ordinary engine; that the engine itself is smaller. The diameter of the driving-wheels of the engine was somewhere near 4 feet.

And thereupon the plaintiff offered in evidence letters of administration, which are hereto annexed, and marked Exhibit "B," and rested the case upon his part.

And said defendant, to maintain the issues upon its part, called as a witness—

J. F. BARKS, who testified as follows:

I am a photographer, & took these views of Academy street &
86 the railroad crossing & vicinity. The point of observation as marked on them is accurately represented, as near as I could judge. These are correct representations of the localities which they purport to exhibit.

And thereupon the defendant offered in evidence two photographic & one stereoscopic views of Academy street, which are hereto annexed, & marked, respectively, Exhibits "C," "D," & "E;" Exhibit "C" being a view of Academy-street crossing, & the line of approach thereto from the west along the north side of Bluff street; Exhibit "D" being a view from the crossing itself up the railway tracks to the northeast; and Exhibit "E" being a stereoscopic view, showing the residence of Mrs. Whiton & line of approach to and a portion of the tracks & crossing.

And thereupon the defendant called as a witness—

JOSEPH KILP, who testified as follows:

I remember the accident mentioned by the witnesses; was switching for the defendant. We started off from the side track after the car got by the switch. I run along, and jumped on. I got upon the side step of the engine, & crossed over to the fireman's side. As we were running over the street I looked over toward the south. I saw an old man pulling his hair, and acting kind of funny. I told the engineer to look out; I believe that man is kind of crazy. The old man was standing right on the sidewalk, I should think about 10 or 12 feet from the engine. The tank of the engine was then just over Academy street, so I could see out between the engine & tank. As I spoke to the engineer about it, he shut off his engine, & looked out; let the engine run along. He said to me, "You look out the other side, & see if you can see." I couldn't see any one there. I jumped off. When I jumped off, I told him we ran over somebody. I started & helped to carry one of the ladies in. Our engine & The Milwaukee & Prairie du Chien Company's
87 engine passed each other very near the cross-walk, near the south end of the M. & P. du C. freight depot. When I got on the engine Dictator, the fireman was ringing the bell. He continued to ring it until after the accident happened. I noticed it at that time, because when I was crossing on the engine, after getting on the fireman's side, this Lewis was pulling the bell cord, & pulled off my hat. There was no obstruction to the view of a person standing on this crossing at Academy street, between there & Bump & Gray's warehouse, except that train passing along. After that passed, there was nothing.

I never took particular notice, but then I should think that, standing in the engine, & looking over the top of that tender, you could not look down so as to see a person crossing the track within 3 cars, perhaps more.

Cross-examination:

After the tender, engine, and car passed the switch, I changed the switch, got on, & rode down to Academy street. The tank had got over the sidewalk when I saw Mr. Rice: the engine was just on the sidewalk. I didn't know that anything had happened then. The engineer had been looking back over the tank, the direction he had been running. When the engine stopped, I got off on the northwest side. That was the first anybody on the train knew that anybody had been hurt. I saw them first. I swear that I remember that the bell was rung until we got to Academy street. I know Mr. Conger; I believe I had a conversation with him upon this subject at his office. I don't now remember what I told him. I don't recollect whether I stated the same as I have stated here to-day. I might not recollect if I stated the facts differently. I don't know whether I endeavored to tell him the truth at that time as I remembered it, because I didn't think I was obliged to. I don't know whether I undertook to state to him what the facts were as near as I could remember. I think it probable I told Mr. Conger that that bell was rung. I couldn't say whether I told him what was untrue on that occasion or not.

Question. Did you tell him that, just as you got on the engine,
88 the fireman Lewis rung the bell as the train was starting west.

Answer. I think I did. I think I mentioned to him the same thing about the bell-cord pulling over my head.

Question. Did you then say to him, "You could not say how long the bell was rung—whether it was rung until after the train was started?"

Answer. I don't recollect.

Question. Did you tell him that you remembered that the bell was rung just as it started, but that you couldn't say whether it was rung when the train was under way?

Answer. I don't recollect whether I told him that or not.

Question. Didn't you tell Conger on that occasion that you were talking with Lewis?

Answer. I don't recollect whether I told him so or not. Lewis was standing back from me on the tank. He was ringing the bell. That was all I know. The engineer was standing with his back to the engine valves, because, when I spoke to him about the man upon the sidewalk, he turned round.

Question. Did you mean to say that you intentionally lied when you stated that conversation with him?

Answer. I don't know as I did, but perhaps I didn't take as much pains. I didn't take pains to tell Conger all I knew, because I thought he was trying to pump me. That is what I mean.

And thereupon the defendant called—

JOHN NELSON, who testified as follows:

Occupation, engineer on the C. & N. W. R'y. After taking that car from Norton's warehouse I backed down very slow. When I started I told the fireman to ring the bell; he did so. The first I seen, Kilp told me there was something the matter. I looked out on my side; could

see nothing. Of course, I stopped as quick as I could. This Milwaukee train came along & made a very heavy noise. I know the bell
89 on the Dictator was rung. When Kilp got on the engine it was ringing. I think the bell was rung all the time along down. I was always very careful to have the bell rung. There was nothing to obstruct the view between this crossing and Bump & Gray's warehouse after that Milwaukee train was passed away. The driving-wheels on that engine was 3½ feet; the tender wheels perhaps 24 inches. The top of the tender is about 6 or 7 feet above the track. The top of the cab was a foot or two higher. Then the smoke-stack projected 2 or 3 feet above the top of the cab. This engine & tender & car was perhaps 68 or 70 feet long. The freight car was probably 8 or 9 feet high; the smoke-stack a foot high—somewhere along there. I didn't see anything of these ladies or Mr. Rice before the accident. As I run along down there I had my head out of the window, looking toward the south all the while, on the easterly side of the engine.

Question. Do you always confine yourself to running 4 or 5 miles an hour with your tender?

(To this question the defendant, by its counsel, objected as calling for incompetent testimony; which objection the court then & there overruled, and the defendant, by its counsel, to the said ruling & decision then & there excepted; and said witness proceeded to testify as follows:)

I was not at that time running at a higher rate of speed than 5 miles an hour; sometimes I did. It was cold & blustering; that was a motive to run slower. I was probably about the length of the engine or so from Academy street crossing when I first knew anything had happened. I learned from Mr. Kilp. He told me there was a man making motions. Kilp got off the engine before it was stopped. I didn't know anybody was hurt until Kilp told me, after he got off the engine. I heard the bell on my engine ring after I passed High-street crossing. I recollect its being rung below that. I think it was rung clear down.

90 Question. Do you say it was rung down to the crossing where the ladies were injured?

Answer. I don't know any reason why he should stop to ring the bell. I told him to take hold of the bell & ring it.

Q. My question is, whether you are willing to swear it was rung down to that point.

A. I am willing to swear it was rung down to that point.

Do you so testify?

A. I do.

Q. Do you say down to that crossing where the ladies were struck by the tender?

A. There is a point there I know.

Q. Do you remember whether the bell was rung down to that crossing?

A. It is pretty exciting times—pretty hard for a man to think specially where a man is accustomed to hear the bell. It is pretty hard thing for a man to swear to, but I think the bell was rung.

Q. Now, was the bell rung down to Academy-street crossing?

A. I couldn't swear to that.

Q. Didn't Mrs. Burns bring two gentlemen, Roberts & Conger, on that day, & didn't you have a conversation with them?

A. I don't know anything about it. I couldn't swear to it. I have

an idea they talked with me, but don't know where it was, or the time.

Q. Did you tell them, in substance, that the bell was rung at the upper crossing from Bump & Gray's warehouse, but you didn't know whether it was rung at the crossing on Academy street?

A. I don't think I did. I was not under oath at that time.

Q. Do you say you didn't tell those gentlemen that the bell was rung at the upper crossing, but you didn't know whether it was rung at the crossing on Academy street?

A. I couldn't tell whether I told them anything or not.
91 I remember I was sworn at the coroner's inquest.

Q. Did you testify on that coroner's inquest that, by looking straight back over the tender, you could see the track half a car length from the tender?

A. I don't think I did. I should not be apt to unless I got pretty excited. If I did, I didn't tell the truth.

Q. Did you testify on that occasion, "I didn't blow the whistle; that would not do?"

A. That is the ordinance of the city, that you are not allowed to blow the whistle.

Q. Did you testify to this, "I don't recollect whether he rung the bell after Jo. got on?"

A. No, sir; I did not. I don't think I did.

Q. Are you positive?

A. I am pretty positive of it.

Q. That you didn't testify on that occasion that the fireman didn't ring the bell after Jo. got on?

A. How could I testify to that, when it was up above, right the contrary way?

And thereupon the defendant called as a witness—

JAMES LEWIS, who testified as follows:

I was fireman on the Dictator at the time of the accident. I did not know anything of the happening of the accident until after we passed that crossing; not until we had come to a full stop. I think Kilp got on some 2 cars' length south of the switch. He couldn't have got on any nearer than that, I don't think. It was my duty to ring the bell. When we left the short side-track, I commenced ringing the bell; but how far I rung it I don't remember. I commenced ringing the bell, I think, a little south of High street. The ordinance read that the bell was to be rung between the two railroad bridges. I always tried to ring it as much as I could, & I always did so. I do it mechanically. Of course, I can't remember every time. I think I stood in my place while we were backing down to Academy street. The engineer stands on the right-hand side. I stand on the left-hand side. During this time I was looking out through the gangway mostly, kind of over
92 the top of the tender, at the track, in the direction we were going. From my position I should think it was about 150 feet from the engine to where my eye would strike the track. I did not see the ladies or Mr. Rice at all.

Question. Where is the switchman's place upon your train when the train is backing?

(To this question the defendant, by its counsel, objected as calling for immaterial & incompetent evidence, for the reason that no foundation for such proof is laid in plaintiff's declaration, & the legislature of

Wisconsin having provided what precautions should be used by the defendant, the court had no right to say, or leave it to the jury to say, that others should have been taken; which objection the court then & there overruled, and the defendant, by its counsel, to said ruling & decision then & there excepted.)

Answer. There is a board on the back end of the tender, but they have put it on for their own convenience. I should think that was the proper place. I don't know as they had any orders to occupy any particular place.

Re-direct examination:

The business of the switchman is to attend the switches, coupling, & uncoupling. He is sometimes on the ground, sometimes on the engine. He does not get on the cars or engine unless he has a great way to go.

And thereupon the defendant called as a witness—

WILLIAM H. JOHNSTON, who testified as follows:

Was employed on the M. & P. du Chien R'y, switching. The bell on the Northwestern engine was ringing at the time they passed the switch. As they went by the switch there I was standing on the platform, within a step or two of the door. I helped make up this Milwaukee train. I think the number of cars in that train was 15. It was principally empty. Lewis called to me, and I looked over & answered him. That is what called my attention to his ringing the bell.
93 He stood up in the tank. As he called to me he was facing me. It was a cold day. He was jumping up & down, ringing the bell. When I saw it last the cab of the engine had just passed the switch. They were then ringing the bell. Then I turned & went into the office.

And thereupon the defendant called as a witness—

MICHAEL DOLAN, who testified as follows:

I was walking south on the platform of the M. & P. du C. R'y Co. I took a little notice of this M. & P. du C. train as it went past. It probably might have been running about 14 miles an hour, 15, along there. When I was going into the office I notice that the bell of the engine Dictator was ringing. It was then down to that crossing; I believe it is High-street crossing.

And thereupon the defendant called as a witness—

JAMES MURRAY, who testified as follows:

At the time of this accident I was on the engine of this Milwaukee freight train mentioned, acting as fireman. I recollect passing the engine Dictator. I think it was a little north of the south end of the M. & P. du C. freight house. I observed the engine as I passed. The bell was rung. I saw Lewis when he was ringing the bell. I couldn't swear that I heard the bell of the Dictator very distinctly. I saw the bell-cord ringing, and the bell moving. I saw the fireman standing up, pulling the bell-cord. I could see him through our window, between the tank & cab. I heard of this accident that day; that called my attention to ringing of the bell. The accident was talked about among our men. The engineer and I talked about it.

And thereupon the defendant called as a witness—

GEORGE PEACOCK, who testified as follows:

I didn't really see anything of this occurrence. I saw it in about

half a minute afterwards. My attention was first drawn to the Dictator. I was 10 or 15 rods south of Academy street, walking on towards the Prairie du Chien depot. I heard the bell ringing. I looked up & saw the Dictator and these women on the track. I ran to stop the engine, and asked Jo. what was the matter. At that the boys started & helped carry the women in. The bell was ringing; that was what
94 drawed my attention to it. It was an unsual thing for me to hear the bell ring, for I hadn't been to work for the company only 4 weeks.

And thereupon the defendant rested the case on its part.

& the plaintiff recalled—

SANFORD A. HUDSON, who testified as follows:

The coroner's inquest was taken before me. I think it was taken next day after the accident. John Nelson was sworn on that examination. I took written minutes of the testimony. I have them with me.

Question. Did Nelson, on that occasion, testify to this, "I could see the track plainly; I could see the track half a car from the tender?"

(To this question the defendant, by its counsel, objected for the reason that no foundation had been laid for impeachment; which objection the court then & there overruled, and the defendant to said ruling & decision, by its counsel, then and there excepted.)

Answer. He testified to that, I think, independent of my minutes, although that refreshes my recollection. He testified upon that occasion, as near as I can recollect, "My recollections are that I told the fireman to ring the bell. He took hold of it & commenced ringing it. This was this side of the switch. It was before Jo. got on. I don't remember where I was when he stopped ringing the bell. I can't tell when it stopped." I recollect that he testified, "I don't recollect whether he rung the bell after Jo. got on."

And thereupon the plaintiff called as a witness—

W. G. ROBERTS, who testified as follows:

I remember the occasion of the injury to Mrs. Whiton & Woodward very distinctly. On that day I had a conversation with John Nelson, the engineer. It was but a short time after the accident. I think Nelson said the bell was rung at the crossing above, but he could not tell whether it was rung at this crossing or not.

And thereupon the plaintiff called as a witness—

H. S. CONGER, who testified as follows:

95 I know the witness Joseph Kilp. On the 18th day of August, 1865, I had a conversation with him as to whether the bell upon the Dictator was rung upon this occasion. I hold in my hand a memorandum of what Kilp said to me at that time.

Question. Did Kilp say he couldn't say how long the bell was rung, or whether it was rung at all after the train was started?

(To this question the defendant, by its counsel, objected because no foundation for impeachment had been laid; which objection the court then & there overruled, and the defendant, by its counsel, to said ruling & decision then & there excepted.)

Answer. He said that he couldn't say how long the bell was rung, but he remembers it was rung just as he did start, but couldn't say whether it was rung when under way. I was present at the conversa-

tion that Roberts stated. I heard Nelson say that the bell was rung at the crossing by Bump & Gray's warehouse; he said he could not say whether it was rung from there down, moving down, or not. I have a distinct remembrance of what Kilp said, distinct from this memorandum.

Cross-examination:

Question. How happens it you used the past tense in your memorandum, & say you "had" a conversation

Answer. I don't know any other reason than that I wrote it just as it appears. I can't state why it was drawn so. I used the verb in the past tense.

Upon the foregoing, the same being the substance of all the proofs and material testimony given on the trial of this cause, the parties respectively rested.

The plaintiff thereupon asked the court to instruct the jury as follows:

1. The first question you are to consider is, whether there was culpable negligence on the part of the servants of the defendant in this action, directly tending to produce the destruction of Mrs. Whiton's
96 life; and upon this branch of the case your are instructed that, in backing trains over much-travelled thoroughfares in a city, railroad companies are bound to exercise a very high degree of care to prevent collisions with passengers who may have occasion to cross the rails, and not to exercise such care is culpable negligence. In this connection you are to consider, from all the evidence, whether a due degree of care was used by the servants of the defendant in backing the train over Academy street at the time Mrs. Whiton was fatally injured.

2. But though you may find there was culpable negligence on the part of the servants of the defendant at the time of the disaster, yet the defendant is not necessarily liable in this action if there was contributory negligence on the part of the deceased, directly leading to her fatal injury. The deceased was only bound to use that degree of caution which might be reasonably expected from a person in her situation, and in this connection you will consider her sex, her liability to be deceived or confused by her surroundings, the nature of the weather, the peculiarities of the engine, and all the circumstances that may bear upon the question whether a woman situated as she was used all the care which could reasonably be expected of her. If she did not, then the defendant is not liable in this action, even if its servants were culpably negligent, unless it shall further appear that, notwithstanding such want of ordinary care on the part of the deceased, the servants of the defendant might, if they had exercised ordinary care, have prevented the disaster.

3. If you shall find from the evidence that the defendant's servants were guilty of culpable negligence which produced the loss of Mrs. Whiton's life, & that the deceased was free from contributory negligence, as already explained, then the defendant is liable in this action, and the measure of damages is the pecuniary loss the plaintiff
97 has sustained by the death of his wife; and in estimating this pecuniary damage a wide range of enquiry is opened. You are to consider the situation of the plaintiff's family at the time of the disaster, the age & capacities of the deceased, and every circumstance that might contribute to the pecuniary loss of the plaintiff from the

death of his wife. You are peculiarly qualified to make such an investigation, bearing in mind that the extreme limit of the defendant's liability is the sum of five thousand dollars.

And thereupon the defendant, by its counsel, requested the court to instruct the jury as follows:

1. Upon the pleadings and evidence in this action the plaintiff is not entitled to recover, and you will find a verdict for the defendant.

2. If the passing of the train of The Milwaukee & Prairie du Chien Railway Company, immediately before the accident, and the delay in crossing, or temporary obstruction to her view caused thereby, so far contributed to cause the injury received by Mrs. Whiton that she would not have been injured except for the passing of such train as aforesaid, then the plaintiff can not recover, even if the defendant was guilty of negligence which also contributed to cause such injury, and Mrs. Whiton was free from all negligence.

3. If the freight train of The Milwaukee & Prairie du Chien Railway Company, in crossing Academy street immediately before the accident, was running at an unlawful rate of speed, and this so far contributed to cause the injury to Mrs. Whiton that she would not have been injured except for such running at such unlawful rate of speed, then the plaintiff cannot recover, even if the defendant was guilty of negligence which also contributed to cause such injury, and Mrs. Whiton was entirely free from negligence.

4. The plaintiff cannot recover unless the evidence shows that the defendant was guilty of some wrongful act, neglect, or default
98 which caused Mrs. Whiton's death; and if either she or The Milwaukee & Prairie du Chien Railway Company, its agent or servants, were also guilty of a wrongful act, neglect, or default which proximately contributed to cause the injury from which she died, & without which she would not have received such injury, the plaintiff is not entitled to recover.

5. To entitle the plaintiff to recover it must appear from the evidence that the defendant or its servants were guilty of some wrongful act, neglect, or default which caused, or contributed to cause, the fatal injury received by Mrs. Whiton, & that she exercised ordinary care to avoid such injury. Neither of these things can be presumed. The plaintiff must prove the defendant or its servants guilty of some wrongful act, neglect, or default; that such act, neglect, or default caused, or contributed to cause, the injury; that Mrs. Whiton exercised such care to avoid injury as is usually exercised in like circumstances by persons of prudent and careful habits. And if the evidence leaves either of these things in doubt the plaintiff cannot recover.

6. In view of the evidence the defendant is not chargeable with any wrongful act, neglect, or default if its servants in charge of the engine observed the statutory requirement as to ringing the bell before crossing Academy street; and if the evidence fails to show that it was not so rung, no fault can be imputed to the defendant.

7. Under ordinary circumstances a person possessing the use of those faculties should use both eyes & ears to avoid injury in crossing a railway track; and if in this case the wind and noise of the freight train tended to prevent Mrs. Whiton from hearing the approach of defendant's engine, she was under the greater obligation to use her eyes. It was her duty to look carefully along the tracks of defendant's railway, both northwardly & southerly, before attempting to cross them, and it was not a sufficient excuse for failing to do so that the day was cold & windy, or that one train had just passed on the track nearer to her.

99 8. It was the duty of Mrs. Whiton to look carefully along the tracks of defendant's railway to the north before putting herself in the way of danger and in time to see & avoid any engine or train approaching from that direction. If necessary, in order to do this, it was her duty to pause before starting to cross until the freight train had so far passed as to give a sufficient view to determine whether she could safely cross; and if she failed to look carefully along these tracks to the north, after this freight train had so far passed as to give her such a view, and in time to have seen & avoided defendant's engine, the plaintiff cannot recover.

9. The evidence shows that it is about 29 feet from the westerly rail of the track upon which the freight train was moving and the westerly rail of that upon which the defendant's engine was backing, and if the deceased failed to wait for a reasonable opportunity & look northwardly along the tracks before starting to cross, or to look while passing over this space, she was guilty of negligence, & the plaintiff cannot recover.

10. If Mrs. Whiton saw defendant's engine in time to have easily avoided it, and made no attempt to avoid it, she was negligent, and the plaintiff cannot recover.

11. Under the pleadings and evidence in this action, the plaintiff, if entitled to recover at all, cannot recover more than nominal damages.

12. This is an action to recover a monied compensation for the pecuniary injury and damage resulting to the plaintiff from the death of his wife, Mary F. Whiton, and nothing can be allowed for the mental anguish which the plaintiff has suffered, or for loss of the society of his wife, or on account of the pain and suffering endured by her, or to punish the defendant.

13. The plaintiff cannot recover in this action for any pecuniary loss or injury which did not result from the death of the deceased; hence the expense of medical attendance, nursing, or any other expense in-
100 curred in consequence of the injury to the deceased, but not in consequence of her death, are not to be considered; neither can damages be given on account of funeral expenses.

14. The plaintiff, if entitled to recover at all, cannot recover in this action for any injury which may have resulted, or will hereafter result, from the death of their mother to the children of the said plaintiff and Mary F. Whiton.

15. Under the pleadings & evidence the plaintiff, if entitled to recover at all, cannot recover on any ground except for loss of service of the deceased. In estimating the damages on this account, the value of her services over & above the cost of her maintenance is all that can be allowed; and if the cost of her maintenance would have been equal to or more than the pecuniary value of her services, the plaintiff cannot recover anything more than nominal damages.

16. The plaintiff cannot recover any damage in this action on account of the loss of the services of Mary F. Whiton subsequent to the date of the commencement of this action.

17. If the plaintiff is entitled to recover at all, he cannot recover any damages on account of the loss of the service of Mary F. Whiton, except from the date of her death to the date of plaintiff's marriage with his present wife.

18. You cannot allow the plaintiff compensation for any item of loss or injury which you may suppose he has sustained by reason of the death of Mary F. Whiton, unless the evidence shows that such loss or injury has resulted, or will actually result, from such death to the plaintiff. You cannot indulge in conjecture, speculation, or guessing at the damages,

but can allow only for such pecuniary injuries as the evidence shows have or will actually result to Henry K. Whiton from the death of his wife.

19. More care is required in passing such a railway crossing as
101 that at Academy street than in crossing a common street or single railway track, and Mrs. Whiton should have exercised a degree of care proportioned to the danger—such a degree of care as is usually exercised in like circumstances by persons of careful & prudent habits—and if she failed to do so, the plaintiff cannot recover; or if by the exercise of such care she could have escaped injury, the plaintiff cannot recover.

Each of which instructions of both parties the court declined to give, except so far as the same are contained in the instructions given of its own motion to the jury. And to the refusal of the court to give the several instructions asked on the part of the defendant the counsel of the defendant then & there severally excepted, that is to say, an exception was taken by the counsel for the defendant to the refusal of each of said instructions asked upon its part.

And the court in a part of its charge used the following words:

"The lookout should be of such a character as (while consistent with the proper management of the engine) to guard against possible accidents. * * And it was therefore the duty of those who had charge of the train to keep a lookout & see where their train was moving."

And the defendant, by its counsel, did then & there duly except to all that portion of such charge expressed in the words last above quoted.

And the court further charged in the following words:

"And independently of this, it was also the duty of those who had the management of the train to have regard to the particular circumstances under which the train was placed, * * the passing of a freight train in the opposite direction, which was calculated to obscure the view of any persons who might be standing at the crossing on the north side of the track at Academy street; & therefore there was, I think, a peculiar vigilance incumbent on those who had the man-
102 agement of the switch train to ring their bell & keep a proper lookout."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last above quoted.

And the court further charged in the following words:

"The main question here is, Was the bell rung as the train approached Academy street, so as to give warning to any persons who might be on that street & might want to cross; *as* was it kept ringing up to the time that the tender & engine crossed the street?"

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last above quoted.

And the court further charged in the following words:

"Another fact in determining the question of negligence, perhaps, on the part of the defendant, should not be lost sight of, and that is the character of the weather at the time and the direction the wind was blowing & its violence. It was blowing from Academy street towards

the train, as it was coming down, and not from the train towards Academy street. That was a circumstance—if it was a violent wind, such as was calculated to affect the sound of the approaching train or of the bell—which should have induced to increased watchfulness on the part of those having the management of the train."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last before quoted.

And the court further charged in the following words:

"If, in point of fact, the bell of this engine was not rung by those who had charge of the train so as to give warning in sufficient time to any person who might wish to cross the track at Academy street, there can be no doubt that it was an act of negligence on their part."

And the defendent, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last above
103 quoted.

And the court further charged in the following words:

"But it certainly was the duty of those who had the management of the engine to see where the train was going, & not to rush recklessly & blindly along the railroad track through a populous town."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the language last above quoted.

And the court then proceeded to charge in the following words:

"To say that, under all circumstances and on all occasions, it is the duty of a person so crossing a railroad track upon a public street to stop and take a look up and down the track deliberately, is not what the court can say is a rule of law."

And thereupon the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last above quoted.

And the court then proceeded to charge in the following words:

"The only rule, I think, that we can lay down applicable to such a case as this is the following, that Mrs. Whiton was required to exercise that degree of prudence, care, & caution incumbent on a person possessing ordinary reason and intelligence under the special circumstances of the case, having reference to the fact of its being a railroad crossing, also to the fact that she, in company with her friend, had stopped in order to enable another train to pass by on a track of the railroad. All that can be required is, I think, ordinary prudence, care, and caution."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last above quoted.

And the court then proceeded to charge in the following words:

"If it was their duty to look up and down after the freight train had passed, did they see the switch train? We do not know; and if they saw it—if they glanced round, as perhaps would be ordinarily true or might be of persons in crossing—a mere glance, not a fixed look—
104 and saw the engine, what was the inference? We do not know. We cannot tell whether they saw it, or what conclusion they may have drawn if seen—whether they supposed it was moving or standing still—moving one way or another."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last before quoted, but not to the statement of any fact therein contained.

And the court further charged in the following words:

"It is certain, if they saw it, that it was their duty to try and avoid contact with it, * * that is to say, if from what they saw they could infer the train was about to cross Academy street. Of course, a different rule might follow if they supposed the train was standing still, or was moving in the opposite direction. They are to be judged by the impression made upon their minds at that time."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last before quoted.

And the court further charged in the following words:

"The only effect of the passage of this freight train on the Milwaukee & Prairie du Chien track is this, that it ought to have had an influence on the conduct of the parties. * * I don't think the fact that the freight train was running at a greater speed than was warranted by law can have any other effect."

And the defendant, by its counsel, then & there duly excepted to al that portion of such charge expressed in the words last above quoted.

And the court further charged in the following words:

"It might have modified the rule, & undoubtedly did modify the rule, of conduct applicable to the various parties, and, as I have already said, conducing, on the part of those having the management of the switch train, to greater watchfulness, to a stronger necessity of ringing the bell, because the movement of the freight train would naturally create more or less noise, & consequently a greater necessity of giving
105 the proper warning of the approach of the switch train to Academy street; also, perhaps, it should have had its influence upon those who were standing at the crossing."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge last before quoted.

And the court further charged in the following words:

"I think you ought to bear in mind also, as having some weight upon your conclusions upon this subject, the fact that the person killed was a woman; that Mr. Rice, the witness, who has testified before you, was also waiting, & passed on."

And the defendant, by its counsel, then & there duly excepted to all that portion of such charge expressed in the words last before quoted.

And the court further charged in the following words:

"The supreme court has said that it is a matter largely resting with the sound reason and discretion of the jury. Taking all the facts & circumstances into consideration, you may consider the personal qualities, the ability to be useful of the party who has met with death, and, of course, also the capacity to earn money."

And the defendant, by its counsel, then & there duly excepted to that portion of such charge last quoted.

And the court being requested to make the charge as to the duty of

the defendant as to ringing the bell more explicit, further charged in the following words:

"The bell should be rung—for instance, the switch train was approaching Academy street—the bell should be rung in sufficient time before the train reached Academy street, to give warning to any persons who might be wishing to cross the track at Academy street, and should be kept ringing up to the time that the tender reached the street, and, I think, until the tender crossed the street."

And the defendant, by its counsel, then & and there duly excepted to all that portion of such charge expressed in the words last above quoted.

106 As the counsel of the defendant has extracted from the charge of the court certain passages to which exceptions are taken, it is thought but fair, in order that they may be judged from the context, that the charge itself should be inserted as reported & on file, and, therefore, at the request of the plaintiff's counsel, it is here annexed:

Charge of court.

GENTLEMEN OF THE JURY: The common law, where any one lost his life by the wrongful act of another, did not authorise an action against the person who committed the injury in the name of the representative of the deceased. That has been thought to be a defect, and accordingly the statutes of various States, including England, provide that where an action could be maintained against another for a wrong done, at common law, in case the injury results in the death of the person, it can be brought in the name of the representatives of that person. And such is the law of this State; & this action is brought by Mr. Whiton, as the representative of his wife, to recover for what is alleged to be a wrongful act done by the defendant, which resulted in her death.

The circumstances of the case seem to be substantially these: Mrs. Whiton and Mrs. Woodward were residing in Janesville, in this State, in December, 1864, near each other, on Bluff street. On a morning near Christmas of that year they started out, proceeded along Bluff st., on the north side of the street, until they came to Academy street; they then turned down Academy street till they reached the railroad crossing. There seem to have been, at that time, four tracks—two of the Milwaukee & Prairie du Chien road, which were the nearest to Bluff st., and two of the defendant, the Chicago & Northwestern road, which were the furthest from Bluff st., and from them, in the act of crossing the railroad track. At the time they arrived near the railroad crossing there was a freight train in the act of crossing Academy street,

107 proceeding along the track in a northeasterly direction, and on the second track—that is, the track nearest the tracks of The Northwestern Railroad Co. Mr. Rice, a witness, who has been examined before you, it would seem from his testimony, arrived at the crossing a short time before the ladies, as he says, "They came up;" and when he arrived there, the engine of the freight train thus crossing Academy st. had passed by Academy st. They, therefore, remained there until the freight train had passed by Academy st.; then they attempted to cross the railroad track, proceeding along the street.

Mr. Rice says that he crossed immediately after the train had passed; that shortly after he got across the track he heard a scream, & turned

around and saw that the ladies had been thrown down by a switch train which had come along originally from a switch south of those two tracks, and had then come upon the most southerly of the two tracks of the Northwestern road, and which, it seems, must have crossed Academy st. very soon after the freight train had passed by in an opposite direction. The statement of Mr. Rice is, that he had not proceeded more than a rod or so from the track when he heard the scream of the ladies; they were struck by the tender of this switch train; the train was backing down the track. The tender was in front of the engine—that is, front as it was moving—and to the engine there was a car attached. The train, therefore, consisted of a car, which was further up the track, then the engine, and next the tender.

This caused the death of these two ladies. Mrs. Woodward died shortly after, and Mrs. Whiton lingered some weeks. There is no controversy but that this caused the death of Mrs. Whiton, and the question for you to determine is, whether there was negligence on the part of the defendant, or its employees, which caused this death, and whether there was any negligence on the part of Mrs. Whiton which contributed to the result. The rule upon this subject I take to be this: That the jury must be satisfied from the evidence that the negligence of the defendant or its employees caused the death of Mrs. Whiton, in order to return a verdict against the company, and Mrs. Whiton must
108 have been herself free from fault or negligence. If she were guilty of any fault or negligence which contributed to the result, the plaintiff cannot recover, even if the defendant or its employees were guilty of negligence. Then, the first question for you to determine is, whether there was any negligence on the part of the defendant or its employees.

This switch train was passing over the track through a considerable town, where there were several crossings, and, therefore, where it was liable to meet passengers who had a right to pass over those crossings on the various streets over which the track passed. The law of this State, as I understand it, requires that, under such circumstances, those who have the charge of the engine must, a sufficient time before crossing a particular street—in this instance, a sufficient time before crosing Academy st.—*to* give warning to passengers, ring the bell of the engine, and must keep it ringing up to the time of crossing the street. And, independent of this statutory provision, I think it is, as a rule of law, also incumbent on those who have the management of the engine, under such circumstances to keep a proper lookout in the direction in which the train is moving, and the lookout should be of such a character as (while consistent with the proper management of the engine) to guard against possible accidents; and it was, therefore, the duty of those who had charge of the train to keep a lookout, & see where *there* train was moving. And, independent of this, it was also the duty of those who had the management of the train to have regard to the particular circumstances under which the train was placed. Those circumstances were, besides the crossing of Academy st., the passage of a freight train in the opposite direction, which was calculated to obscure the view of any person who might be standing at the crossing on the north side of the track at Academy st.; and therefore, there was, I think, a peculiar vigilance incumbent on those who had the management of the
109 switch train to ring their bell & keep a proper lookout, because it was natural, if there were any persons standing at that crossing, (this freight train passing along at the time,) that they would seek to cross the track after the freight train had gone over the street. Now,

were or were not the defendants, or their employees, guilty of any negligence in these particulars in the management of this train? Was the bell rung? You have heard the evidence upon that point. There would seem to be no controversy but that, about the time, or shortly after the train was started from the warehouse, and very possibly at the point where the switch came in contact with the other track, the bell was rung; although I think the testimony of some of the witnesses, among others that of Mr. Norton, is to the effect that the bell, at the time it passed the point of the switch & the other track, was not then ringing. There is, however, testimony, perhaps, which may be considered in conflict with this. The main question here is, Was the bell rung, as the train approached Academy st., so as to give warning to any persons who might be on that street, & might want to cross, and was it kept ringing up to the time that the tender & engine crossed the street? There is great conflict in the evidence upon this point. The question is, What is the fact in relation to it?

Mr Kilp, who was the switchman, states that the fireman rung the bell when the train started, & continued ringing it up to the time of the accident; and he refers to a particular circumstance which he says enabled him to recollect the fact—that his hat was struck off by the fireman in ringing the bell. Mr. Nelson, the engineer, also states that the bell was rung; that he gave orders to have the bell rung; that it was usual to have it rung, and he thinks that it was rung. Mr. Lewis, the fireman, who was the person that actually rung the bell when it was rung, states that the bell was rung when the train started, & at the time that the
110 point of the switch & the other track was passed; but he does not distinctly remember how far or how long he continued to ring the bell, & therefore does not pretend to assert that the bell was rung a sufficient time to give warning to any who might wish to cross the railroad track at Academy st., nor does he recollect that he rung the bell up to the time the engine & tender crossed the street. His testimony, I may remark, was given with great fairness & apparent truthfulness; that is to say, he stated the fact so far as he could recollect it, and no further. The testimony of Kilp and Nelson, the switchman and the engineer, was given in a way which was open to your observation and comment, & the degree of credibility to be attached to their testimony, as it was given in by them, is, of course, for the jury to determine. Their testimony, however, has been affected, as it is claimed on the part of the plaintiff, very considerably by the evidence of statements made by them at another time in conflict or contradiction of those made before you. The account that they gave at the coroner's inquest has been given in evidence, and, if that is correctly stated, it does not conform in all respects to their statements before you; and it is for you to say how far these statements made before the coroner's jury may affect their testimony here, recollecting, at the same time, that what was said then was said when public attention, so to speak, as well as the personal attention of every man connected with the transaction itself, were directed to the particular subject of inquiry before the inquest. Another fact in determining the question of negligence, perhaps, on the part of the defendant should not be lost sight of, and that is the character of the weather at the time, and the direction the wind was blowing, and its violence. It was blowing from Academy st. towards the train as it was coming down; not from the train towards Academy st. That was a circumstance—if it was a violent wind, such as was calculated to affect the sound of the approaching train or of the bell—which should
111 have induced to increased watchfulness on the part of those hav-

ing the management of the train. The fact I wish to impress upon the jury is this, that while we can give some general rules applicable to a particular case, still we must mainly judge of the facts & circumstances which exist at the time that the transaction occurs which is the subject of inquiry before the court & jury. It is the duty of the jury, so far as is possible, and the evidence will permit, to transport themselves to the scene, & see with the lights spread before them there, what were the particular circumstances of the case which they are called on to decide.

If, in point of fact, the bell of this engine was not rung, by those who had charge of the train, so as to give warning in sufficient time to any persons who might wish to cross the track at Academy street, there can be no doubt that it was an act of negligence on their part; equally so if there was not a proper lookout kept at the time, having reference, of course, I wish you to understand, to the other duties which they were called upon to discharge—the management of the engine & of the train. Something has been said as to the necessity of having a switchman on the tender, in order that there might be an efficient & perfect lookout. The court will not instruct you that that was absolutely necessary. The court does not understand, and thinks the evidence does not establish that it was his duty to be on the tender in this instance. But it certainly was the duty of those who had the management of the engine to see what the train was going, and not to run recklessly & blindly along the railroad track through a populous town. If there was negligence, (and that is the question to be determined in the first place whether there was negligence on the part of the defendant or its employees,) you must also be satisfied that negligence caused the death of Mrs. Whiton.

Secondly. Was there any negligence or fault on the part of Mrs. Whiton which contributed to her death?

If there was, then the plaintiff cannot recover, although the 112 employees of the defendant may have been guilty of negligence.

As the court has already stated, it is difficult to lay down any precise rule as to the duty of a person in crossing a railroad track in a street of a town. We may say, generally, it is the duty of such a person to exercise ordinary prudence and caution. To say that, under all circumstances and on all occasions, it is the duty of persons so crossing a railroad track upon a public street to stop & take a look up & down the track deliberately, is not what the court can say is a rule of law.

The question depends so much upon the exigences of the moment & of the occasion, so to speak, that we must be guided in each case by the circumstances that exist in order to say what should be the conduct of a person. A person, in going along a public street of a city or town, whose duty it is to keep that street in repair, or crossing a bridge, is not obliged to look at every precise spot upon which he may put his foot as he walks along. It is to be presumed that he may occasionally look around and somewhere else than directly upon the spot where he plants his foot; and in crossing a bridge, if there are planks taken up, and in attempting to pass which he falls & injures himself, it might be said to be an act of negligence on his part, and for this injury the city would not be responsible; and yet, if there is a hole in the bridge which he does not see, acting with reasonable prudence, and he falls in & injures himself, the town or the city might be responsible. The only rule, I think, that we can lay down, applicable to such a case as this, is the following: that Mrs. Whiton was required to exercise that degree of prudence, care, & caution incumbent on a person possessing ordinary reason & intelligence, under the special circumstances of the case, hav-

ing reference to the fact of its being a railroad crossing; also to the fact that she, in company with her friend, had stopped, in order to enable another train to pass by on a track of the railroad. All that can
113 be required is, I think, ordinary prudence & care & caution.

If she was wanting in any of these, under the circumstances in evidence, and that contributed to her death, then the plaintiff cannot re-

is dead; Mrs. Woodward is also dead. What they saw we do now. Whether they saw the train we do not know. They were stopping until the freight train passed, in order to cross the railroad on Academy st. It was natural that, as soon as the obstruction their way was removed, *that* they should attempt to cross. The degree of prudence or care or caution was necessary on her part under the circumstances in evidence?

As we know, there were three persons there—Mr. Rice, Mrs. Woodward & Mr. Woodward. Mr. Rice crossed immediately. The bell which train was not heard by him, and, as I understand, the accident not seen. He passed rapidly forward & escaped all injury. Mrs. W. died shortly afterwards & were killed. If it were their duty to look & listen down, after the freight train had passed, did they see the train? We do not know; and if they saw it—if they glanced [illegible] as perhaps would be ordinarily true, or might be, of persons approaching a crossing—a mere glance, not a fixed look—& saw the engine, what was the inference? We do not know. We cannot tell whether they saw it or what conclusion they may have drawn if seen; whether they supposed it was moving or standing still; moving one way or another. It is certain, if they saw it, that it was their duty to try & avoid contact with it; and if, seeing it, they passed on, running such a risk, the action cannot be maintained on the part of the plaintiff; that is to say, if from what they saw they could infer the train was about to cross Academy st.

Of course, a different rule might follow if they supposed the train was standing still, or was moving in the opposite direction.

114 They are to be judged by the impression made upon their minds at the time, & by the facts which were before them, the various circumstances then present, & the objects which they then could see.

The only effect, I am inclined to think, of the passage of this freight train on the Milwaukee & Prairie du Chien track is this, that it ought to have had an influence on the conduct of the parties, those having the management of the switch train, & those crossing the track at Academy str. I don't think the fact that the freight train was running at a greater speed than was warranted by law can have any other effect. It might have modified the rule, and undoubtedly did modify the rule of conduct applicable to the various parties, and, as I have already said, conducing, on the part of those having the management of the switch train, to greater watchfulness—to a stronger necessity of ringing the bell, because the movement of the freight train would naturally create more or less noise, &, consequently, a greater necessity of giving the proper warning of the approach of the switch train to Academy st.; also perhaps it should have had its influence upon those who were standing at the crossing.

I don't think that you can dissever the conduct of the parties from the circumstances which existed at the time, & which should have influenced their conduct. I think you ought to bear in mind also, as having some weight upon your conclusions upon this subject, the fact

that the person killed was a woman; that Mr. Rice, the witness who has testified before you, was also waiting and passed on.

These are all circumstances proper to be taken into consideration, because you are bound to transport yourselves, so far as possible, to the very scene of the disaster, & judge, from what was there visible, of the conduct of the parties.

If then, gentlemen, the defendant was guilty of negligence which contributed to the death of Mrs. Whiton; if Mrs. Whiton was
115 guilty of no fault or negligence which contributed to the result, then the next question will be, what damages the plaintiff is entitled to recover in this case.

Those damages have been specified by the statute, but in very general terms:

"The jury may give such damages, not exceeding five thousand dollars, as they shall deem fair & just, in reference to the pecuniary injury resulting from such death, to the relatives of the deceased specified in this section."

As we understand, that means that if the plaintiff is entitled to recover at all in this case, he is entitled to recover for damages for such pecuniary injury as has resulted to him from the death of his wife. It is confined by the language of the statute to pecuniary loss, not the loss arising from grief, or wounded feelings, or sufferings of any kind, but such pecuniary loss as he has sustained from the death of his wife; it is from her death, not from any loss which he sustained prior to that, but for the pecuniary loss which he has sustained from her death.

It is almost impossible to lay down any absolute, fixed rule upon this subject.

The question has been recently discussed by the Supreme Court of the United States upon a statute which in this respect is essentially the same as the statute of this State; and the Supreme Court has said that it is a matter largely resting with the sound reason & discretion of the jury. Taking all the facts and circumstances into consideration, you may consider the personal qualities, the ability to be useful of the party who has met with death, and, of course, also the capacity to earn money.

It is not proper for the jury to look upon it simply as a question of feeling or sympathy. The statute does not permit that; all such considerations should be dismissed from your minds. It is a mere matter of dollars and cents—so regarded by the statute—pecuniary injury sustained.

Exceptions allowed.

THOMAS DRUMMOND. [SEAL.]
A. G. MILLER. [SEAL.]

116 *Stipulation.*

U. S. ct. ct., dist. of Wisc.

HENRY K. WHITON, ADM'R., &C.,
vs.
THE C. & N. W. R'Y COMP'Y.

It is hereby stipulated that the map made by S. D. Locke & such of his evidence given on the trial of Woodward vs. The Chicago & N. W. R'y Co., as plaintiff may desire to read, may be offered in evidence without producing said Locke as a witness, with the same effect as if said Locke was made a witness to testify to such matters, & as to when

said map was made, the accuracy of the distances, & other matters shown and represented thereby; and that the defendant may offer in evidence any photographic or stereoscopic views of the place of the accident and vicinity, made one J. F. Barks, without producing said Barks as a witness, & with the same effect as if said Barks were made a witness, & testified when—from what point of observation—the localities exhibited by the same, & the accuracy of the same, respectively, & to all other matters to which said Barks, as the artist who took the said views, would be able and competent to testify.

April 12, A. D. 1870.

CONGER & SLOAN,
Pl'ff's Att'ys.
WILLIAM RUGER,
Def't's Att'y.

(Endorsed:) Filed April 12, 1870.

Circuit court of the United States, district of Wisconsin.

HENRY K. WHITON, ADM'R, &C.,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY Company.

It is hereby stipulated that the map & photographic views ad-
117 mitted in evidence on the trial of this suit may be attached to the bill of exceptions, to be sent with the record in said cause to the clerk of the Supreme Court of the United States.

CONGER & SLOAN,
Pl'ff's Att'y.
WILLIAM RUGER,
D[illegible]'s Att'y.

(Endorsed:) Filed June 28, 1870.

(Here follow map marked page 117, and Exhibits C, D, and E.)

118 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America for the district of Wisconsin, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the district of Wisconsin before you, between Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, plaintiff, and The Chicago & Northwestern Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Chicago & Northwestern Railway Company, as by the complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done therein, to correct that error, that of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth.

EDWARD KURTZ,
Clerk U. S. Circuit Court Dist. of Wis.

(Indorsed:) Filed May 6, 1870.

EDW. KURTZ, *Clerk.*

119 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

The United States of America to Henry K. Whiton, administrator of the estate of Mary F. Whiton, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Wisconsin, wherein The Chicago & Northwestern Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of May, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fourth.

A. G. MILLER,
District Judge.

We accept service of above citation this 12th day of May, A. D. 1870.

CONGER & SLOAN,
Pl'ff's Att'ys.

(Indorsed:) Filed May 14, 1870.

120 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

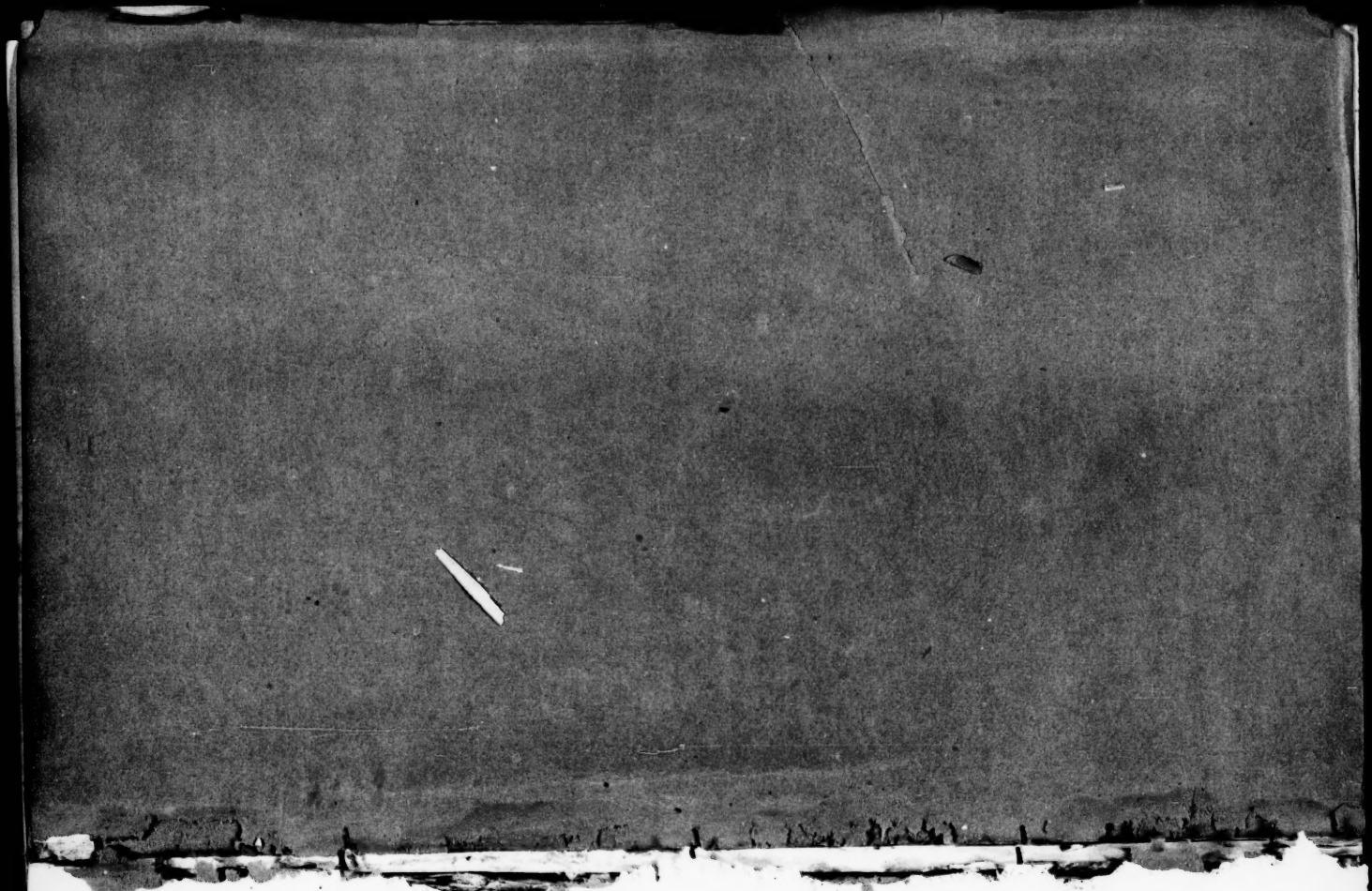
I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Henry K. Whiton, adm'r, &c., vs. The Chicago & N. W. Railway Co.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in said eastern district of Wisconsin, this fourth day of October, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fifth.

[SEAL.] EDWARD KURTZ, *Clerk.*

(Indorsement on cover:) No. 490. The Chicago and Northwestern Railway Company, plaintiff in error, vs. Henry K. Whiton, administrator of Mary F. Whiton, dec'd. Wisconsin C. C. U. S.

Filed 11th October, 1870.



SUPREME COURT OF THE UNITED STATES.

No. 258.—December Term, 1871.

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY K. WHITON, ADMINISTRATOR OF THE ESTATE OF MARY F. WHITON, DECEASED.

BRIEF FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 258.—December Term, 1871.

THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY K. WHITON, ADMINISTRATOR OF THE ESTATE OF MARY F. WHITON, DECEASED.

This is an action under § § 12 and 13, ch. 135 general statutes of Wisconsin (revision of 1858) instituted to recover the pecuniary injuries resulting to the defendant in error from the death of his wife. The action was commenced in the Circuit Court of Wisconsin for Rock county, from whence the venue was changed to Jefferson county. While there pending for trial, the plaintiff petitioned for its removal to the Circuit Court of the United States, under the act of March 2d, 1867.

The Court ordered the removal, but directed a stay of proceedings under the order, to enable the defendant to perfect an appeal therefrom to the Supreme Court of the state, and provided further that in case such appeal should be perfected, that all proceedings be stayed until after its determination. (Transcript 14.)

An appeal was duly perfected conformably to law and the practice of the state courts (1) but the plaintiff disregarded the order staying proceedings, obtained copies of the process, pleadings and proceedings, and procured an order that they be filed and the cause entered for trial in the United States Circuit Court.

Upon the first day of the next subsequent term, the defendant objected to the jurisdiction and, upon affidavits setting forth the facts

(1) *Mead vs. Walker*, 15 *Wis.*, 497.
Cooley vs. Lawrence, 5th *Duer*, 605.
Ayers vs. Railway Company, 48 *Barb.*, 132.
Affidavits of James H. Howe, P. N. Waterbury and William Ruger. (*Transcript pp.* 18—21.)

relative to the pending appeal and the character of the action and parties, moved to dismiss or remand the cause. This motion was denied and the defendant filed its plea in abatement formally setting forth the objection to the jurisdiction, founded upon the proviso requiring that the action be brought in some court established by the constitution and laws of Wisconsin. To this plea a demurrer was filed and sustained, and the defendant filed its plea of the general issue.

Before the case was called for trial, the Supreme Court of Wisconsin had rendered its decision reversing the order of removal, and thereupon the defendant renewed its motion to remand the case, but the United States Circuit Court maintained its jurisdiction and proceeded with the trial.

The following are the material facts established by the evidence: The deceased, Mary F. Whiton, was the wife of the defendant in error, and at the time of the accident causing her death, was in the prime of life, robust, active, and in the full enjoyment of the faculties of sight and hearing. At this time, and for eight or nine years previously, she had resided with her husband a few rods westerly from, and on a hill overlooking the crossing where she was killed, and the railway tracks in that vicinity. These tracks were much used, and in switching the engines were constantly passing and repassing, moving backwards as often as forwards, and the crossing was also much used by people living on the westerly side of the tracks, in that vicinity.

The morning of the accident was very cold and blustering with a strong wind blowing from the south-west, and there was some snow on the ground. At about 11 o'clock in the forenoon Mrs. Whiton, in company with her neighbor, Mrs. Woodward, proceeded from her residence (1) across to the northerly side of Bluff street (there being no sidewalk on the southerly side) thence along the northerly side of Bluff street to the westerly side of Academy street, thence southerly along the sidewalk on the westerly side of Academy street to a point between the two straight tracks of the M. & St. P. Ry., (the two dark colored straight tracks) where their progress was obstructed by a long freight train passing rapidly to the north-east, on the most southerly of the dark colored tracks. The witness Rice, an old gentleman 72 years of age, had reached the crossing before them, and all waited there for the freight train to pass. Mr. Rice stood "right by the ladies" and "almost close enough to this passing freight train to touch it." After it had passed *the sidewalk* he "immediately, instantly," crossed over with a quick step. He says:

(1) See map and photographic views.]

"I thought I would not be in their way." *I crossed the track immediately, after this freight train passed along—instantly.*" "I took a look at the tracks as I passed. I looked of course where I was going. *I have no particular recollection whether I looked up and down the tracks. I looked forward.*" "*I did not see this switch engine at all.*" "As I got past the tracks I heard a scream and looked around and first saw a glimpse of the women knocked down." "I would not be sure, but it strikes me *Mrs. Whiton had a veil on.*"

This long freight train was running rapidly, and being largely composed of empty cars made a very great noise. Defendant's switch engine was moving backwards, the tender in advance, at the rate of four or five but not exceeding five miles an hour. The collision occurred at the intersection of the sidewalk with the most southerly of the tracks and about thirty feet from the place where the ladies stood, waiting the passage of the long train. After its passage their view, across this intervening space of thirty feet, and for a long way up and down the tracks, was entirely unobstructed and if either of these persons had then cast the most casual glance to the left, along the tracks which had until then been hidden from their view, by this long train, or if they had looked that way while crossing this intervening space of thirty feet, they must inevitably have seen this approaching engine, of the defendant. It was moving at about the same rate, and must then have been almost, if not quite, as near the point of collision as themselves. So far there is no conflict in the evidence and can be no dispute as to the facts. All the evidence upon the subject tends to show that a proper lookout was kept by the persons on defendant's engine, but the court below, regarding the bare fact that they did not see the ladies before the accident, as tending to show the contrary, submitted the question to the jury. The evidence is very brief and we give it in full.

Mr. Kilp says: "I never took particular notice, but then I should think that standing on the engine and looking over the top of that tender, you could not look down so as to see a person crossing the track within three cars, perhaps more. (A car is about 35 feet long.) The tank had got over the sidewalk when I saw Mr. Rice. The engine was just on the sidewalk. I did not know that anything had happened then. The engineer had been looking back over the tank, the direction he had been running."

Nelson (the engineer) said: "I did not see anything of these ladies or Mr. Rice before the accident. As I run along down there I had my head out of the window, looking toward the South all the while, on the easterly side of the engine."

Lewis (the fireman) said: "I think I stood in my place while we

were backing down to Academy street. The engineer stands on the right hand (easterly side); I stand on the left (westerly side.) During this time I was looking out through the gangway mostly, kind of over the top of the tender, at the track in the direction we were going. From my position I should think it was about 150 feet, from the engine to where my eye would strike the track. I did not see the ladies or Mr. Rice at all."

From this evidence it appears that the persons on the engine did look at the track, but that the tender and cab so obstructed their view, that they could not see persons coming suddenly out from behind this long freight train, and passing on to the track so near at hand.

As regards the ringing of the bell, the evidence is as follows:— The witness, Rice, testified that he did not hear the bell, but says that he did hear the bell of the other engine. It was natural to suppose that the bell he heard belonged to the only engine he had seen, but at this time that engine was over thirty rods distant, and separated from him by this long train of empty cars, making, as he says, a very great noise. On the other hand, the witness Kilp says that the bell on defendant's engine was rung, both before and while crossing the street, and the witnesses, Lewis, Dolan, Murray, and Johnston (whose testimony was in nowise contradicted or impeached) say that the bell was rung just before arriving at the street, and the witness Peacock says that it was ringing just after crossing.

This question, also, was submitted as one in regard to which the evidence was conflicting.

FIRST POINT.

The Court below never acquired jurisdiction.

1st. Because it was Excluded by the Character of the Parties.

The plaintiff was appointed administrator by the County Court of Rock County, Wisconsin, and sues as such.

In this character, he is as much a creature of law as the defendant corporation, and there is an apparent inconsistency in holding that

the habitat of the legal entity determines the question of jurisdiction in one case, while in the other, it is the residence of the natural person.

But as these are not open questions, we shall concede that the plaintiff is a citizen of Illinois, and that the habitat or legal dwelling place of the defendant determines the question of citizenship upon its part.

The defendant's railway lies partly within, and it derives its powers and franchises in part from, each of the States of Illinois, Wisconsin and Michigan Its principal office is in the State of Illinois, and its managing officers reside there. It has one common treasury, one board of directors and officers, and one common seal. Its contracts bind all of its property and franchises in whichever state the same may be, and it is for all practical purposes, one indivisible corporation. These facts are set forth in the affidavits, used on the motions to remand the case to the State Court. (Affidavits of William H. Ferry and William Ruger. Transcript 223.)

As regards this question of jurisdiction, however, it is quite immaterial whether the company be considered a separate and distinct corporation in each state, or as one and the same in both. (1st Black. Rep. p. 297.) In either case, this must be regarded as a suit between a citizen of Illinois, as plaintiff, and citizens of that State, and of the State of Wisconsin, joined as defendants.

Ohio & Mississippi R'y Co. vs. Wheeler.
1*st Black.*, 286.
The County of Alleghany vs. R'y Co., 51 *Penn. St. R.* 228.

These cases are decisive of the present. In the former, a railway company, having like charters from the States of Ohio and Indiana, sued a citizen of the latter State and this Court held that it must be regarded as a suit by citizens of Ohio and Indiana against a citizen of the latter state, and hence not within the jurisdiction of the national courts. In the latter case the County of Alleghany, in the State of Pennsylvania, sued a railway company, which was first chartered by Ohio, and afterward by Pennsylvania. The company presented a petition, alleging itself a corporation of Ohio, and asking a removal of the suit into the United States Circuit Court. The application was denied, and on appeal it was held by the Supreme Court of Pennsylvania, following the case of R'y Co. vs. Wheeler, that a suit against such a corporation was a suit

against citizens of Ohio and Pennsylvania united in business under the shadow of the corporate name, and, therefore, that the United States Courts would have no jurisdiction. According to this doctrine, the Chicago & Northwestern Railway company cannot sue a citizen of Wisconsin or Illinois in the national courts, or remove a case into those courts, when the other party is a citizen of either State; and it must also follow that it cannot be sued in such courts, by citizens of either state, and that such a suit cannot be removed on petition of the other party.

The disability must affect both parties alike.

But it is said that, as this company is a distinct corporation in each state, the suit is to be deemed as against the Wisconsin corporation only; that is, that the company should not be permitted to show the truth in relation to its creation or organization.

In *Alleghany County vs. Railway Co., supra*, the company alleged itself a corporation of Ohio, but the plaintiff was permitted to show that it was also a corporation of Pennsylvania. And in Northern Indiana R'y Co. vs. Michigan Central R'y Co. 15th How. S. C. Rep., p. p. 244–7, it incidentally appeared that the relief prayed would affect the rights of the New Albany & Salem R'y Co. (a corporation of Indiana, which could not be made a party without ousting the jurisdiction) and this Court held that the case was not within the act of 1839; that the Circuit Court had no jurisdiction, and that a Court ought not to entertain a suit, where its judgment will necessarily affect parties, over whom it cannot rightfully exercise jurisdiction.

It is clear, therefore, that this position is untenable. The judgment in the present case concludes the rights of parties not subject to the jurisdiction of the Court, whether the company is a distinct corporation in each State, or the same in both; and whether we look to the citizenship of individual members, or to the habitat of the legal entity

Considering it as one and the same corporation in both States, the legal entity dwells in, and the individual members are presumed to be citizens of both states. Regarding it as a distinct corporation in each, and if the suit is not in form, it is in effect, against both corporations, and, therefore, against citizens of both states.

Should the judgment be affirmed, and the plaintiff levy upon and sell one of the company's engines, the purchaser would undoubtedly acquire title to the whole engine, yet if this company is a distinct corporation in each state, and the rights of the Wisconsin corporation only are concluded, the Illinois corporation would retain its in-

terest, unaffected by the sale. If the suit be regarded as against the Wisconsin corporation only, the judgment concludes the rights of a party which has not, and could not, have been brought into court; if it be regarded as against both corporations, then the court has attempted to adjudicate in a controversy between citizens of the same state. But the latter is the correct view. The judgment is against the company. If the company is one corporation, the judgment is against that one corporation; if it is two corpoations, then the judgment is against the two corporations. Suppose that this company is sued in the State of Illinois, as a corporation of that state, on one of its notes executed and delivered in Wisconsin, and the company answer that the note in question is one of the notes of that Wisconsin corporation of the same name, how would this court treat the defense?

Again, the argument *ex absurdo* is very forcible against this extraordinary position.

If a citizen of Illinois, can sue this company in the United States Court for Wisconsin, by styling it a corporation of Wisconsin, of course a citizen of Wisconsin can do the same thing in Illlinois, by charging it as a corporation of that state; and if this be so, it follows that the company has the corresponding right of suing a citizen of Illinois in the United States Courts of that state, by averring itself a corporation of Wisconsin, and of suing a citizen of Wisconsin, in the national tribunals of that state, by styling itself a corporation of Illinois.

This makes the citizenship of such a company, and the jurisdiction of the United States Courts, wholly dependent upon the will or caprice of the parties and the existence or non-existence of the real facts, upon which both questions in law depend, of no importance whatever. But to show the full measure of absurdity to which this position leads, let us suppose that John Doe and his successors are created a corporation sole, under the same name of *E uno plures*, with the same powers and franchises in each of the states.

Notwithstanding his ubiquitous character as a corporation, he must, as an individual, have some fixed habitation. If we locate him at Washington, he is not a citizen of any state within the meaning of the III article of the Constitution. or the judicial act. He cannot, therefore, as an individual, invoke the jurisdiction of the national tribunals in his controversies with the citizens of any state;

but as a corporation, he is aided by the legal presumption that he is a citizen of every state in the Union, and he may, therefore, style himself a corporation of New York, to sue a citizen of Pennsylvania,—a corporation of Pennsylvania, to sue a citizen of New York, and so on, through all the combinations which may thus be made, unless the other party may show either, that this *E uno plures* is also a corporation of the same state with himself, or that, after all, it is really the suit of John Doe, brought under the shadow of an alias.

Suppose again, that the said John resides at the city of New York and desires to sue a few of his neighbors in the national courts. He may sue neighbor A. by alleging himself a corporation of Pennsylvania, neighbor B. by styling himself a corporation of California, neighbor C. by averring himself a corporation of Louisiana, while neighbor D. may be required to answer the suit of the same John as a corporation of Maine; and at the same time, he is also an individual citizen and a corporation of the state of New York. A position which leads to such absurd and illogical results cannot be sound.

It could not have been intended, either by the constitution or judicial act, to confer any other or greater privileges on corporations than on individuals, with respect to the election of forums.

There is a further remark which we desire to make, in answer to this position.

The phrase "citizens of different states," as used in the third article of the constitution, must refer to those who are such, by virtue of the constitution and laws of the states in which they reside, for it is the exclusive prerogative of the states (except in so far as limited by late constitutional amendments,) to determine the qualifications for citizenship within their own borders.

By the laws of the states creating them, these corporations are not citizens, and yet this court construes the term "citizen," as including them for judicial purposes. Inasmuch, as ignoring a fact, does not change it, many able Judges have thought this exercise of jurisdiction; based upon the habitat of the legal entity, instead of the citizenship of the individual members, wholly unjustifiable; and the court is now asked to go further and assert for the national tribunals, a jurisdiction over suits to which the judicial power does not extend and which can only be maintained by suppressing the jurisdictional facts.

2.—Congress has never Authorized any National Tribunal to take cognizance of this action.

It is not enough that the constitution extends the judicial power to a case, the right to *exercise* this power must also be conferred. To authorize a court to exercise this power in any case, congress must confer upon it jurisdiction both of *the subject matter and of the parties.*

None of the acts providing for the removal of actions profess, or are intended, to confer any new jurisdiction, but simply to authorize the removal of causes over which by virtue of other laws the national courts already have jurisdiction.

Conkling's Treatise 3*d ed.* 177., 4*th ed.* 155 *and cases supra.*

The only law referred to as conferring jurisdiction over this case, is the judicial act of 1789, which provides that "the Circuit Courts "shall have original cognizance, concurrent with the courts of the "several states of *all suits of a civil nature at common law, or in "equity.*"

We are aware that the phrase "suits at common law," *as used in the seventh amendment*, has for special reasons been interpreted the same as "cases at law," in the III article. (*Parsons vs. Bedford*, 3*d Pet.* 444–8.) But we do not find that the words "suits of a civil nature at common law," as used in the judicial act, have ever been so interpreted, and the reasons which were thought to justify such an interpretation in the former case, have no application here. At common law this action cannot be maintained at all, hence it is not "a suit of a civil nature at common law."

Again the recovery is in the nature of a penalty, for while it is measured by the pecuniary injury resulting to the beneficiary, it is also intended as a penalty to punish the wrong doer.

Oldfield vs. R'y Co., 14*th N. Y.*, 316–7.

In Massachusetts a statute passed for precisely the same objects provides for the recovery of a "fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment."

The action is therefore of a penal nature, and the national courts have never entertained suits for the collection of penalties under state laws.

3.—The act of March 2d, 1867, by authority of which this case was removed, is unconstitutional and void.

We do not find that this act has ever been so questioned as to call for an authoritative decision as to its validity, or that this court has ever pointed out the particular constitutional provision warranting the adoption of the 12th section of the judicial act.

In *Martin vs. Hunter*, 1 *Wh. pp.* 349–50 where the validity of the 25th section was in question, it was argued at bar, that the right of removal before judgment was undoubled; that it subserved all the reasons suggested in support of the appellate jurisdiction over causes tried in the state courts, and hence that there was no good reason for sustaining such a jurisdiction.

In combatting this position Judge Storey argues, that the removal of actions is an exercise of appellate jurisdiction; that appellate jurisdiction may be exercised either before or after judgment and therefore, that the right to remove a case for revision, and the right to remove it for original action upon the subject matter, rest upon the same foundation and must stand or fall together. In reasoning to this conclusion he says: "The power of removal is certainly not in strictness of language, an exercise of original jurisdiction; it presupposes jurisdiction to have elsewhere attached."

From this dictum we respectfully dissent, and for reasons which the learned author has himself furnished.

In this same opinion he says: "If, then, the right of removal be included in the appellate jurisdiction, *it is only because it is one mode of exercising that power*;" and in his commentaries on the constitution, he says: "The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject matter has been already instituted in, and acted upon, by some other court, whose judgment or proceedings are to be revised.* This appellate jurisdiction may be exercised in a variety of forms, and indeed in any form in which the legislature may choose to prescribe, *but still the substance must exist before the form can be applied to it.*"

From this it follows that the removal of an action under either of these acts, is not an exercise of appellate jurisdiction, and therefore, not sustained by the appellate power.

Both acts provide that after the removal and entry of the suit in the national court, "*it shall then proceed in the same manner as if it had been brought there by original process.*"

In the opinion referred to, the learned author also says that this power of removal is not to be found in express terms, in any part of the constitution." And this would not be true if it were included in the appellate power. To support that power there is the express provision, that in all cases to which the judicial power extends, and as to which it has not original jurisdiction, this court shall have appellate jurisdiction.

Indeed it seems a gross misnomer to style that an exercise of appellate jurisdiction which wrenches a case from one court of original concurrent jurisdiction, and takes it into another, for original action upon the subject matter.

Again, it has never been supposed that the United States Circuit Courts have any appellate jurisdiction, or revisory powers, over the proceedings of state courts.

And the reason upon which this theory is founded is quite as fallacious as the theory itself. The learned author argues that the power of removal is not an exercise of original jurisdiction, because "it presupposes an exercise of original jurisdiction to have elsewhere attached."

Let us take for illustration controversies between citizens of different states.

Now, it is manifest that the judicial power was extended to this class of controversies, for the supposed advantage of parties so situated, and hence it is assumed that a defendant in such a controversy had the same right as a plaintiff, to insist that it be tried in the national tribunals. This being so, it follows that the jurisdiction of the state court does not fully attach, until he has waived this right. If he does not waive it, but objects to the proffered jurisdiction of the state court, it never attaches at all, and when the jurisdiction of the national court does attach, it is in strictness an original jurisdiction.

We conclude, then, that the removal of an action before the subject matter has been acted upon, is not an exercise of appellate jurisdiction, and, therefore, not sustained by the appellate power.

Irvine vs. Lowry, 14 *Pet. pp* 298–0.

Confining our argument to that class of cases to which the present belongs, we think it will be found that the so called right of removal is to be sustained, if at all, by implication founded on the *reasons* inducing the grant of judicial power extending to controversies between citizens of different states. The *language* is fully satisfied

by construing it as authorizing the national courts to take cognizance of such cases when their jurisdiction is invoked by the party bringing suit; and the only other admissable construction, predicated on the meaning of the words, would force all such controversies into the national courts, even though both parties agree in prefering another forum.

In regard to these reasons Judge Storey says: "The constitution "has presumed, whether rightly or wrongly we do not inquire, that "state attachments, state prejudices, state jealousies and state inter- "ests might sometimes obstruct or control, or be supposed to obstruct "or control, the regular administration of justice. Hence in contro- "versies between states, between citizens of different states, &c., " * * it enables the parties, under authority of congress to "have their controversies heard, tried and determined before the "national tribunals."

These reasons warrant the implication that both parties are entitled to elect the jurisdiction of the national tribunals for the trial of controversies to which the judicial power extends, and over which jurisdiction has been conferred. Any legislation necessary to secure this right, to either party, is no doubt valid; but congress may not go further and confer privileges which cannot be implied from these reasons. The right to legislate is founded on an implication which is derived from, and limited by, these reasons. The power of congress must therefore, be limited by the same reasons—when they are satisfied the right to legislate is exhausted. As regards plaintiffs, no legislation is necessary. Their rights may be fully attained without: the national courts are open to them, and they may invite thier jurisdiction in the beginning. But after making their election and *choosing* the state courts, they cannot make a second election. Such a right is not given by, or to be implied from, any provision of the constitution, and the attempt to confer it, is in derogation of the sovereign powers reserved to the states and vested in their judicatures.

This act of 1867, allowing a plaintiff who has exhausted his privileges as to the election of forums, and, by voluntarily coming into a state tribunal, waived his right to invoke the jurisdiction of the national courts, is therefore unwarranted and void.

Whiton vs. The Chicago and N. W. R'y Co., 25 *Wis. R.*

It is also repugnant to the seventh constitutional amendment if it authorizes the removal of cases, after judgment.

The Justices vs. Murray 9th Wall., 277-8.

And the language does not seem susceptible of any other construction.

Sneed vs. Brownlow, and Sneed vs. Pickens. 4th Caldwell, Tenn. R. 253.

SECOND POINT.

There is no law authorizing the maintenance of this action, in any national court.

The statute of Wisconsin (§§ 12 and 13, ch. 13 R. S. 1858) upon which, alone, the right of action depends, does not give an absolute right; but a right subject to certain conditions precedent, among which are the following, stated in the language of the statute:

"Provided such action shall be brought for a death caused in this state, and in some court established by the consittution and laws of the same."

With respect to this last limitation, we shall consider:

First—Its intent and effect, if valid.

Second—Whether it is valid.

Third—The effect of holding it invalid.

I.—Its intent and effect if valid.

1. In the court below the plaintiff sought to evade this obstacle by a hypercritical interpretation of the word "brought," arguing that when the suit had been commenced in the state court, this condition was satisfied, and that it might then be removed to the national court for trial.

To this catch-straw argument we shall answer very briefly.

In adding this limitation, the legislature of Wisconsin departed from the phraseology of the statute, serving as models; they selected apt and definite words, putting them in the emphatic form of a proviso, and they must have had some definite, substantial object in view. This construction makes them mean nothing but the requirement of an idle form. What possible object could there be, in requiring that the action be commenced in a state court, if it could

then be removed into a national tribunal for trial? It will be observed that this word "brought" was chosen with reference to both clauses of the proviso, *and is immediately connected with the first.*

If it be true that some other word would more accurately express the legislative intent in this regard, it argues nothing. In using one verb for two clauses in this way, it is usual to select it with reference to that with which it is immediately connected. If this last clause had been first, quite likely the word prosecuted would have been chosen; but in the order in which the clauses stand, the word brought is the more appropriate.

Except for this limitation a citizen of Wisconsin, causing a death here, might, if found within their jurisdiction, be prosecuted in the courts of other states, and a recovery had by proving the Wisconsin law. This consideration may have had its influence. The first clause, "Provided that such action shall be brought for a death caused in this state," seems to have been adopted for a kindred purpose. It prevents a resort to the courts of Wisconsin, for the prosecution of like actions, given by the statutes of other states; and disaffirms any intention of giving actions for deaths caused by citizens of Wisconsin, while beyond her borders.

It is a domestic statute, enacted for the regulation of internal affairs. In so far as it seeks to punish wrongful acts and ensure the observance of greater care, it is a police regulation wholly within the control of the state, and it was in accordance with the spirit and object of the act, to limit the prosecution of actions under it, to the courts of the state.

But whatever the considerations, influencing the adoption of this clause, it is clear that its intention and effect is to limit the prosecution of the action given to the state courts of Wisconsin.

2. Again, if the interpretation contended for were adopted, it would avail nothing. No action can be removed which might not have been originally commenced in the national court. The language of the act: "And the said copies being entered as aforesaid, "in such court of the United States, the suit shall there proceed in "the same manner as if it had been brought there by original pro- "cess," justifies such a conclusion, and the authorities so construe exactly the same language, contained in the 12th section of judicial act.

Rogers vs. Rogers, 1 *page Ch. R.* 183–5.
Smith vs. Rines, 2 *Sumner pp* 344–6.
Rush vs. Cobbett, 2 *Yeates* 265.

The State vs. Cobbett, 3 *Dallas* 467.
Beardsley vs. Torrey, 4 *Wash. pp* 286–8.
Conkling's Treatise 3d Ed. 177, *4th Ed.* 155.

Cases like Barney vs. Globe Bank, where the national courts can take jurisdiction so far as the subject matter is concerned, form no exception to the rule, although stated as such. If in any such case, the defendant had been found within the reach of its process, the action could have been commenced in the national court, but not so with actions under this statute, however narrow a definition may be given to this word brought.

So, as we have already seen, the action could not have been commenced in the United States Circuit Court, because it has never been authorized to take cognizance of such actions. (ante-page.)

2.—Is this Clause of the Proviso Valid?

It is conceded that the legislature might have conferred an absolute right of action, but it is said that it had no power to confer a conditional right. If this be so, it is one instance, where the greater power does not include the lesser. It is a strange proposition which says to the legislature of the states: You have the power to confer new absolute rights of action, but when you attempt to create a limited right, to annex a condition to the gratuity you offer, that moment your power is exceeded. The condition is void, and the conditional right becomes absolute: You have the power to give the right and to take it away, even as to pending actions, but you cannot prescribe the remedy.

It is not claimed that this extraordinary curtailment of legislative power results from any express constitutional prohibition; but, that it results unincidentally, from the delegation of judicial power to the United States. The argument is briefly this: The constitution of the United States extends the judicial power to controversies between citizens of different states. This is such a controversy; congress may therefore, confer upon the national courts, jurisdiction over it, and authorize the plaintiff to invoke that jurisdiction, hence this clause, restricting the remedy to the state courts, is unconstitutional and void.

To make this position of any value, it must appear that the constitution extends the judicial power to this controversy, or that congress is authorized to, and has extended it to such actions. Otherwise there is no conflict.

The constitution does extend the judicial power to *all* cases of certain classes, but when it comes to this class the word *all* is omitted and its language is, the judicial power shall "*extend to controversies between citizens of different states.*" It is conceeded that this omission was not accidental, and that the constitution does not extend the judicial power to *all* such controversies. The clause in question is not therefore, necessarily in conflict with the constitution. But it is said that this provision commits it to the discretion of congress, to extend the judicial power to any or all of this class of controversies, and that congress has extended it to this controversy. If such a discretion is vested in congress it is not conferred in express terms, nor is it seen that the language used justifies such an implication. To so construe it, would, in effect, interpolate the word *all*, where it has been *intentionally* omitted.

Had the framers of the constitution intended to confer such a discretionary power would they not have retained this word *all* and expressed this intention in the same phraseology, as the like intention was expressed with reference to other cases? Here is an important change of language, and yet this construction makes it mean absolutely nothing.

We are persuaded that congress has no authority to extend the judicial power to any case, but simply, to authorize its exercise over cases to which the constitution extends it; that the constitution does not extend it to all controversies between citizens of different states; and that the rule for determining to which it is extended, is to be sought in the reasons for extending it to any, and for omitting to extend it to all such controversies.

This is the inference to be drawn from that contemporaneous legislative construction, the judicial act, which confers jurisdiction over such of this class of controversies only, as are within the reasons inducing this grant of judicial power.

We cannot refer to the reasons for omitting to extend this power to all such controversies in detail, but will briefly allude to one, applicable to the case at bar. Before the adoption of the constitution it was a rule of the common law, that where a statute confers a right and gives a remedy, that remedy is exclusive, even though wholly inadequate, and this, because it is presumed that the legislature did not intend that the right should be enjoyed, unless through the means prescribed.

Sedgwick on Stat. and Con. Law, 94, 402–5.
Field vs. The People, 2d *Scam. Ill. R.* 79.

And if in such a statute a court is named in which the right may be enforced, *it is a part of the remedy*, and the jurisdiction of that court is exclusive.

Cole vs. the city of Muscatine, 14 *Iowa R.* 296.
Dudley vs. Mayhew, 3 *Comst'k*, *pp* 13–15.

In view of this existing approved rule of law, is it not highly probable that the framers of the constitution contemplated the granting of new statutory rights, to be attained by a resort to commissioners, boards of arbitration or to special tribunals: and therefore omitted this word *all*, in certain clauses of the constitution, so that they might not in terms or spirit include such controversies? But if the extent of the judicial power, as to this class of controversies is wholly committed to the discretion of congress, then we say that it it does not extend to the present case because, as we have seen, congress has never authorized any national court to take cognizance of it. This condition of the statute limiting the remedy to the state courts, is not therefore, in conflict with any act of congress.

In actions and proceedings wholly depending upon the statute prescribing a remedy, the parties must oftentimes be citizens of different states, and yet we have never seen an intimation that the remedy so given was not exclusive. Indeed, the power of the states thus to condition rights conferred by them, upon remedies excluding the jurisdiction of the national courts, is expressly recognized in the decisions of this court.

Clark vs. Smith, 13 *Pet. pp* 303–4.
The Steamer St. Lawrence, 1 *Black. pp* 530–1.

It is true that certain state laws, attempting to divest the jurisdiction of the national courts over actions maintainable in equity or at common law, have been disregarded. So, statutes prescribing remedies in common law or equitable actions, and attempting to prevent the national courts from administering them, have been disregarded. The propriety and reason of this is apparent.

The jurisdiction of the national courts does not depend upon and cannot be divested by state laws. While they are not bound in such cases to follow remedies given by such laws, yet they may, in the exercise of jurisdictional powers vested in them, adopt any remedy, not inconsistent with the laws of the United States, and hence they cannot be prevented from adopting any such remedies if they see fit. In every such case they could have adopted the remedy in question, had it never been prescribed by state law.

It was upon these principles that the following and other like cases, were decided:

Parker vs. Overman, 18 *How.* 137. *See pp* 140–1.
The Union Bank of Tenn. vs. Jolly's Adm'rs id. 503.
Payne vs. Hook. 7 *Wall.* 425.
Cowles vs. Mercer County, 7 *Wall.* 118.

In the last mentioned case the reasons sustaining the positions of the court are not fully stated. It is apparent however, that the principal reason is found in the fact that when the county of Mercer was created and empowered to make contracts, the power to sue and be sued was necessarily implied. The provision of the statute expressly so providing, is mere surplusage; and if the decision of the Supreme Court of Illinois referred to, holds that the right to sue or liability to be sued, depends upon this latter provision, it is clearly erroneous.

Of course the remedy thus authorized is exclusive in the courts of that state, whether the action be purely statutory or maintainable at common law, but as to the national courts we have already seen that it is otherwise if the suit is maintainable at common law. The distinction, then, between the Present case and that of *Cowles vs. Mercer County*, is in this: Here the right to maintain the action cannot be implied from the act creating and conferring certain powers upon the defendant company; but is wholly dependent upon a distinct and separate statute, which offers a gratuity upon condition that it be recovered in the state courts, and the plaintiff seeks to obtain the recovery without complying with the condition upon which it is offered· (*See the People vs. Murray* 5 *Hill N. Y. R.* 471–2) In the other case, the right to sue and the liability to be sued, necessarily result from the power to make contracts and did not depend upon the statute prescribing a remedy All courts are open to enable the county to enforce her rights under such contracts and all courts will be open to the other party excepting o course, those which are subject to the authority of and whose jurisdiction is excluded by the laws of Illinois.

One further suggestion against the validity of this clause demands a brief notice. It is said that a citizen of Illinois might negligently cause a death in Wisconsin, and being served with process while within the state, be forced to have his controversy adjudicated in the courts of Wisconsin if this clause is to be respected.

This is certainly true and the answer is that citizens of other states who voluntarily come into the state of Wisconsin, subject themselves to the liabilities imposed, and become entitled to the benefits and protection afforded by her laws. And it is also true that if a citizen of Kentucky (whose laws do

not authorize such actions) should be killed while within the state of Wisconsin, through the negligence of one of her citizens, the administrator could come into the courts of Wisconsin and obtain a recovery which the laws of his own state would not allow.

3.—The effect of holding this clause invalid.

If this clause be invalid, then we say that the whole statute must fall, and with it the sole and only authority for maintaining this action.

This proposition would seem to be clear upon principle, so long as we admit that courts cannot legislate. As the legislature of Wisconsin have passed the law, the right given is conditional; if the clauses imposing conditions are rejected, it will be absolute. But we need not rely upon general principles. The authorities establish our position with the clearness and certainty of a demonstration. The first class, to which we refer, establish this rule, stated in the language of Judge Cooley, in his work on constitutional limitations: "If the provisions of a statute are so mutually connected with, and dependent on, each other, as conditions, considerations, or compensation for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them."

Cooley's Con. Lim., pages 178–9.
Coles vs. Muscatine 14 *Iowa* 296.
Slauson vs. Racine 13 *Wis.* 403–5.
Warren vs. Mayor &c., 2d *Gray*, 98–100.
Campau vs. the City of Detroit 14 *Mich. pp* 283–5.
Quinlan vs. Rogers, 12*th Mich* 168.
Meshmier vs. State 11 *Ind. R. p.* 483.
State vs. Commissioners 5 *Ohio* 597.
Lathrop vs. Mills 19 *Cal.* 513.

The second class of authorities establish the rule that "A proviso in deeds, or laws, is a limitation or exception to a grant made, or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided."

Sedg. on stat. & Con. Law. page 162.
Dwarris on statutes, with proviso.
Voorhees vs. Bank of U. S. 10 *Pet. pp* 469–71.
Bouviers Law Dic. Title proviso.
Burrell's Law Dic. Title proviso.

If this condition were not stated in a proviso, and we were compelled to rely solely upon the rule first stated, our position would still be unanswerable.

If this court can say that the legislature would have passed the statute without this condition, then the court can also say that it would have passed the residue of the statute without the condition, that the act, neglect or default shall be "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damage in respect thereof," and without the conditions that the action "be brought, for a death caused in this state," and "within two years after the death of such deceased person." But as to these conditions stated in the proviso, there is no room for conjecture. The legislature expressly say that the residue of the statute would not have been passed without them; this is the office and meaning of a proviso.

Taking the two rules together then, we have the demonstration of our proposition that if this clause be rejected, the whole statute and authority for maintaining this action in any court falls with it. Let us re-state them as they apply to the case at bar.

First—"*If the provisions of a statute are so mutually connected with, "and dependent or conditioned upon each other, as to warrrant the belief, "that the legislature intended them as a whole, and if all could not be car- "ried into effect, would not pass the residue independently; then if some "parts are unconstitutional, all the provisions which are thus dependent or "conditional, must fall with them.*"

Second — "*A proviso in deeds, or laws, is a limitation or exception to "a grant made or authority conferred, the effect of which is to declare that "the one shall not operate, or the other be exercised, unless in the case pro- "vided.*"

THIRD POINT.

The court erred in its charge to the jury, and in refusing instructions asked by the defendant.

1.—In refusing instructions as to the duty of deceased to use her eyes and ears to avoid danger, and in the charge as given upon this point.

(Transcript 60–1—instructions 7–8–9.)

The instructions asked were to this effect: That it was the duty of the deceased to use both eyes and ears, to avoid danger in crossing defendant's

railway; that if the wind and noise of the long freight train tended to prevent her from hearing, she was under the greater obligation to use her eyes; that it was her duty to look along the tracks both northerly and southerly before attempting to cross, and putting herself in the way of danger, "and that it was not a sufficient excuse for failing to do so, that the day was cold and windy, or that one train had just passed on the track nearer to her." That, if necessary, in order to get a view of the tracks to the north in time to see and avoid danger from that direction it was her duty to pause until the intervening freight train had so far passed as to give a sufficient view; that if the deceased failed to look along the track to the north, after the freight train had so far passed as to give her a sufficient view: That if the deceased failed to look along the track to the north, after the freight train had so far passed as to give her a sufficient view to determine whether she could safely cross, and in time to have seen and avoided defendant's engine, she was guilty of negligence.

These propositions are strictly correct and the instructions should have been given.

Skelton vs. Ry. Co. Law R. 2d C. P. 631.
Stubley vs. Ry. Co. Law R. 1 *Exch.* 13.
Butterfield vs. Ry. Co. 10 *Allen Mass. R.* 532.
Ry. Co. vs. Hielman 49 *Penn. St. R.* 60.
Ry. Co. vs. Coyle 55 *Penn. St. R.* 396.
Gonzals vs. Ry. Co. 38 *N. Y. Rep. pp* 440–4.
Grippin vs. Ry Co. 40 *N. Y.* 34 *see pp* 35–7 40–1, 44–5, 47–8, 50–1.
Ry. Co. vs. Still 19 *Ill* 499.
Ry. Co. vs. Gretzner 46 *Ill pp* 84–5.

We also invite the attention of the court to the language of other authorities, referring to the particular question under consideration.

In *Shaw vs. Ry. Co.* 8 *Gray pp* 72—3, referring to the duty of the person injured the court say: "Did she know that a railway track was "there? If she did, did she, before permitting the horse to enter "upon the track, *stop or pause and listen and look up and down the track* "to ascertain by *both senses* whether a train was in sight or hearing."

In *Spencer vs. Ry. Co.* 5 *Barb.* 337, the court say: "It is impossi- "ble to maintain that the plaintiff was free from negligence, because he

"either saw the train approaching before he drove upon the track, or he "did not If he did, it was an act of madness voluntarily to place him- "self in the way of the train. If he did not, as is most probable, * "* * that was an act of most lamentable want of care."

In *Brown vs. Ry. Co.* 31 *Barb.* 338, the court say: "It is true that "a person crossing a railway track is bound to use his eyes and ears to dis- "cover and avoid danger, and if he fails to do this, and receives an injury "which he might otherwise have avoided, he will not be allowed to re- "cover."

In *Wilds vs- Ry. Co.* 24 *N. Y.* 440, it is said: "When every one who "knows that the railroad is there, is bound to know and remember "that a train may be approaching, *not to take the very simple precaution of "looking and listening to find out whether one is coming, cannot but be want of care To be sure, the statute requires a railroad company to give specified warnings, bat it neither takes away a man's senses nor excuses him from using them.*"

And upon a second appeal in this same case, Chief Justice Denion in pronouncing the opinion of the court says:

"No one can be secure against being met by an engine except by ascertain- "ing by his own senses that no train is approaching in either direction, with- "in a distance which will endanger his safety." And again: "If the case is "such as to require the person wishing to cross to come near the track to "make his observation, that circumstance so far from excusing him from the "duty of looking at all, would only render that duty more imperative if he "would avoid the imputation of negligence." 29 *N. Y. pp* 327-9.

In Telfer vs. Ry. Co. 3*d Am. L. R.* (*N. S.*) *pp* 672-3, the court say, "Common prudence and common caution require every person ap- "proaching a railroad crossing, if he knows of it, to pause and see if he can "cross with safety."

So, in Reeves vs. Ry. Co 30 *Penn. St. R. p* 464, Speaking of the duty of a person about te cross a railway track, the court say: "He is bound to "stop and look out for trains, and may not rush heedlessly nor remain un- "necessarily on a spot over which the law allows engines of fearful power to "be propelled by one of the most resistless agents of nature."

And in Ry Co vs. Evans 53 *Penn. St. R. p* 250, the same court say: "On approaching the railroad it was his duty to *look and listen* for an ap- proaching locomotive." * * *That if he might have heard or seen the train approaching, or if he saw it and mistook the track it was upon, it was negligence not to exercise his senses correctly and place himself out of danger.*"

The statutes of Wisconsin also provide that "All railroad companies in this state, whenever their track crosses a public highway, shall put up or cause to be put up large sign boards over such highways, with the following inscription on both sides of such boards, in large letters: "LOOK OUT FOR THE CARS."

(*R. S. of Wisconsin Ch* 79 § 41.)

And why should the warning be given if it is not a duty to heed it?

The court charged upon this point as follows:

"To say that, under all circumstances and on all occasions, it is the duty "of a person, so crossing a railroad track upon a public street, to stop and "take a look up and down the track deliberately, is not what the court can "say is a rule of law. * * The only rule, I think, that we can lay down appli- "cable to such a case as this, is the following: That Mrs. Whiton was re- "quired to exercise that degree of prudence, care and caution incumbent "on a person possessing ordinary reason and intelligence, under the special "circumstances of the case, having reference to the fact of its being a rail- "road crossing, also to the fact that she, in company with her friend, had "stopped in order to enable another train to pass by on a track of the rail- "road. All that can be required is, I think, ordinary prudence, care and "caution. * * If it was their duty to look up and down, after "the freight train had passed, did they see the switch train? We do not "know; and if they saw it—if they glanced around, as perhaps would be "ordinarily true, or might be of persons in crossing—a mere glance, not a "fixed look, and saw the engine, what was the inference?" (Transcript 63.) The charge conveys the idea that it was not Mrs. Whiton's duty, under the circumstances of the case, to look at all; that "ordinary care, prudence and caution" did not require this, and that even if she was required to look, "a mere glance, not a fixed look," would be all that could be required. This is not the law, and there is not a single authority to support the learned Judge in his obstinate maintenance of these erroneous views. And his reasoning that a failure to ring the bell or pre-occupation of the mind, will excuse a failure to look before crossing a railway track, has been repudiated by every court passing upon the question, and finds no favor except with those few peculiar mental organizations, which find a sufficient reason for dissenting, in the very fact that a proposition is undoubted by all the world beside.

He managed to overcome his scruples as to telling the jury how people should dispose of their limbs and eyes, when speaking of the duty of those on the train. Although these persons all testified that they did look out, but that the tender so obstructed their view, as to prevent their seeing persons coming suddenly from behind this freight train, and passing on to the

track, so near at hand, the learned judge saw fit to charge that "it certainly "was the duty of those who had the management of the engine, to see "where the train was going, and *not to rush recklessly and blindly along the "railroad track through a populous town.*" (Transcript 63) He also charged that if "the bell of this engine was not rung by those who had charge "of the train, *so as to give warning in sufficient time to any person who might "wish to cross the track at Academy street*, there can be no doubt that it "was an act of negligence on their part." (Transcript 64.)

The legislature of Wisconsin having considered what precautions are necessary on the part of those controlling engines, and having prescribed such precautions, it may be doubted whether the courts can superadd to them.

Stubley vs. R'y Co., Law R., 1 *Ex.*, 13.

Beseigle vs. R'y Co., 40 *N. Y.* (*Hand,*) *pp.* 12–14.

But although such a duty is not imposed by statute, we do not complain of the charge that it was the duty of those on the engine to use their eyes and keep a lookout, in order to avoid injuring persons crossing the streets. Our complaint is, that, although required by a rule of the common law, and especially enjoined by statute, he refused to charge that it was the duty of the deceased to use her eyes and "*look out for the cars*;" but in effect charged that under the circumstances of this case, it was not her duty to do so." That ordinary prudence, care and caution do not always require this; that a person is not obliged to look at every precise spot upon which he may put his foot as he walks along, but may occasionally look around; that if it would otherwise have been her duty to keep a lookout, it was to be considered that she "was a woman; that Mr. Rice, the witness who has testified before you, was also waiting and passed on;" and that at all events, their duty would be performed by a "mere glance," which might wholly fail to discover the approaching engine, tender and car then in plain view and less than fifty feet distant, or which, if they saw the engine, would fail to inform them whether it was standing still, or moving from, or toward them.

What an erroneous and monstrously distorted view of the law and facts was this to set before the jury!

Under ordinary circumstances a person is bound to use both eyes and ears to avoid danger, and this without regard to the giving of signals to warn them. These precautions are easy and simple. Both parties are in the exercise of rights It is the duty of both to use all available reasonable precaution, and especially of the party for whose safety the care is required.

Hearing is but a poor reliance at best. If, in the confusion of noises, a bell is heard, it is hard to tell whether it is on this or that side; whether

the engine is upon the track you are about to cross or another, and whether it is about to cross the street or has already passed. In this case *a bell was heard*, but Mr. Rice and probably the laeies, assumed that it was the bell of the long freight train and *did not look* to ascertain the correctness of this assumption. Had they looked they must inevitably have seen defendant's engine; both engines were then in the same direction from them, and under the circumstances of the case—with the wind blowing very hard and in a direction to carry the sound away; with their ears muffled for protection against the bitter cold and with the great noise made by this long freight train of empty cars to further obstruct their hearing; they were under a still stronger obligation to use their eyes.

2.—The Charge as to the Duty of deceased if she saw the engine.

Upon this question the court said: "And if they saw it—if they glanced round as perhaps would be ordinarily true or might be of persons in crossing—a mere glance, not a fixed look and saw the engine—what was an inference? * * * It is certain if they saw it that it was their duty to try and avoid contact with it, and if seeing it they passed on, running such a risk, the action cannot be maintained on the part of the plaintiff, *that is to say if from what they saw they could infer the train was about to cross Academy street. Of course a different rule might follow if they supposed the train was standing still or was moving in the opposite direction.* "They are to be judged by the impressions made upon their minds at that time.

(*Transcript* 63–4 *and* 69.)

This is not an accurate statement of the law. If they took such "a mere glance" as this; if, seeing the engine so near at hand they failed to take a sufficient look to determine whether it was standing still or moving—moving one way or another, they were certainly guilty of great negligence.

Wilds vs. R'y Co., 24 *N. Y. Rep. p* 440.
Telfer vs. R'y Co., 3*d Am. Law Reg., N. S. pp* 667–9.
R'y Co. vs. Evans, 53 *Penn. St.* 254–5.
Langhoff vs. R'y Co. 23 *Wis. p* 44.

3.—In refusing to charge that the burden of proof was on the plaintiff, to show negligence on the part of the defendant, and due care on the part of Mrs. Whiton.

(*Transcript* 60—*instruction* 5)

There was no affirmative evidence as to the conduct of the deceased after she started to cross the track. In the opinion the learned judge says: "Of the conduct of Mrs. Whiton, at the moment, we know nothing, except what may be inferred from the result. * * We do not know whether she glanced along the track, or saw the switch train, and if

"she did, we are ignorant of the impression made on her mind. * * "The chances are that she and Mrs. Woodward followed Mr. Rice imme- "diately, and while he, walking faster, escaped, they were killed."

If these remarks do not show that the court erred in authorizing a finding of due care, they certainly do show, the propriety of giving the instruction asked, and that its refusal was a material error.

For the rule as to the burden of proof see

Robinson vs, Ry. Co. 7th Gray 92 *on p* 97.
Warner vs. Ry Co. 44th N. Y. p 471.
Ry Co. vs. Hyatt 17th Ind. R. 102.
Kelley's Admr. 23d id. 133.
Walters vs. Wing 59th Penn. St. R. pp 213–14.
Manderschid vs. Dubuque 25th Iowa, 13th Ill. R. p 587. 46 *id. p* 83.
Beardsley vs. Swan 4th McLean R. 33.
Telfer vs. R'y Co. 3 *Am. L. R. (N. S.)* 673.
Owens vs. Jones. 9th Md. R. pp 114, 118.

And for rule, where the evidence leaves the question, whether due care has been exercised, in doubt, see

Finn vs. Ry, Co. 102 *Mass. R. pp* 289–90.
Toomey vs. Ry. Co. 91 *E. C. L. R, pp* 148–9.
Cotton vs. Wood 93 *E. C. L. R. pp* 570–2.
Hammock vs. White 105 *E. C. L. R.* 588.
Welfare vs. Ry. Co. L. R. 42 *Q. B.* 693. *Opinion of Cockburn C. J.*

4.—The Charge as to Ringing the Bell and Keeping a Lookout.

As to keeping a lookout the court said: "*The lookout should be of such a character as* (while consistent with the proper management of the engine) *to guard against possible accidents.*

This is impossible and the present case, where the persons injured came suddenly on to the track from a hidden position, well illustrates the impropriety of such a requirement. As to ringing the bell the charge was, that it should be "rung as the train approached Academy street, *so as to give warning to any persons who* might be on the street, and might want to cross." And that it should have been kept ringing, "until the tender crossed the street."

(*Transcript* 62, 63, 65.)

The statement that the bell should have been rung "so as to give warning," &c., was repeated, and although not intended to convey such an idea, was it not liable to be understood as requiring that it be rung so as to *convey actual warning* to persons about to cross?

The time when the bell shall be rung is regulated by statute. The requirement is, that "in all incorporated cities the said companies shall cause the bell on the engine to be rung *before* crossing any of the streets of a city." (*R. S. of Wisconsin, Ch.* 79 § 41.)

It is presumed that all persons have heard the warning bell, or have by looking, informed themselves as to whether they may safely cross, before the engine is actually on the street. And to ring the bell or blow the whistle while in the act of crossing, is prohibited by ordinance in many cities. We think it was error to charge that the bell should have been rung "until the tender crossed the street."

5.—In refusing to charge that the Plaintiff could not recover, if the wrongful act, neglect or default of the other Railway Company so far proximately contributed to cause the injury from which Mrs. Whiton died, that except for such wrongful act, neglect or default, she would not have been injured.

It was certainly very probable that the accident would not have occurred, except for the passage of this long freight train of the other railway company and quite certain that it would not, except for its running at an unlawful rate of speed. If it had been running at a lawful rate, and had arrived at the crossing in time to delay them at all, it would have delayed them so that they would not have reached the point of collision, at the fatal moment.

The instructions asked were based on the evidence showing these facts and the rule of law that where an action is given in the terms of this statute, the injury for which a recovery is sought, must have been *solely* caused by the act, neglect or default complained of.

Rowelt & Lowell, 7 *Gray* (*Mass. R.*) *pp* 100–4.
Richards vs. Enfield, 13 *id. pp* 344–6.
Moore vs. Abbott, 42 *Maine R.* 46.
Sherman & Redfield on Negligence, note 4, *p* 48.

(For the charge as given and reasons for refusing to charge as requested see Transcript, pp 45, 64.)

6.—The Measure of Damages.

We complain of the charge as to damages:

Because the court refused to charge that damages could not be given for funeral expenses; that damages to the children could not be recovered; and that the plaintiff was not entitled to recover damages, on account of loss of service, after the date of his marriage with his present wife.

(*Transcript* 61—*instructions* 13, 14 *and* 17.)

Funeral expenses cannot be recovered.

Dalton vs. R'y Co. 93 *E. C. L. R.* 296.

The statute confines the damages strictly to compensating the pecuniary injury resulting to the beneficiary; in this case to the husband

Woodward vs. R'y Co. 24*th Wis.*

And the services of the present wife must be considered as valuable as those of the former.

We also think the remark: "The supreme court has said, that it is a "matter largely resting with the sound reason and *discretion of the* jury,'" well calculated to convey the impression that the jury was not bound by the evidence, but might, as they did in this case, supply the want of proof of damages, by giving as near the sum which they would take for their own wives, as the law would allow them to go.

See Potter vs. Ry. Co. 21 *Wis. pp* 374–6.
Duckworth vs. Johnson, 4 *Hurl. & N.,* 653.
R'y Co. vs. Sweet. 45 *Ill., pp* 204–5.

The exceptions to this charge are certainly numerous and yet we think there is one more which should have been taken. An exception to the charge as a whole, for being *one-sided.* We cannot refrain from saying that as an argument to the jury in favor of a verdict for the plaintiff, this charge is a great success; but as a statement of the law, it looks like an attempt to traverse all sound rules applicable to the case

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FOURTH POINT.

The Court Erred in its Rulings Admitting Evidence.

1. The plaintiff was permitted, against objection, to prove that it was customary and usual for switch engines to be left standing on the tracks in the vicinity of the crossing where the accident occurred: (*Transcript* 49.) And to prove that on other occasions, the defendant's engines were propelled at a rate of speed greater than allowed by law. (*Transcript* 55.)

The general conduct of the defendant was not in question and this evidence was improper.

Bannon vs. R'y Co., 5*th Am. Law Reg.* 470–1.
1*st Allen* (*Mass. R.*) 189.
Robinson vs. R'y Co. 7*th Gray, p* 95.
Warner vs R'y Co. 44 *N. Y., pp* 471–2.

2. After defendant's counsel had admitted that Mrs. Whiton's death resulted from injuries caused by the collision with defendant's engine, the plaintiff was permitted against objection to prove that she was pregnant at the time of the accident. (Transcript 49.) This evidence was wholly immaterial and well calculated to excite the sympathy and prejudice of the jury. In these actions the damages are strictly compensatory and a verdict for $5,000 where the evidence did not show affirmatively that any damage was actually sustained and where $500 would fully cover all that can fairly be inferred, well illustrates the effect of this character of evidence.

WILLIAM RUGER, Att'y for Plaintiff in error.

J. O. Howe
Atty for Plaintiff in Error

Supreme Court of the United States.

THE CHICAGO AND NORTHWESTERN R. R. COMPANY, Plaintiffs in Error,

vs.

HENRY K. WHITON, Adm'r of the Estate of MARY F. WHITON, deceased.

The track of the railway belonging to the plaintiff in error crosses Academy street, in the city of Janesville, at nearly right angles.

On the third day of December, 1864, Mary F. Whiton, then the wife of the defendant in error, and in full possession of all her mental and physical powers, while crossing the railway track, in company with another lady, in broad daylight, was struck by a locomotive moving on the railway, and was killed.

On the fifth day of October, 1866, the defendant in error commenced suit in the circuit court for Rock county, in the State of Wisconsin, to recover damages occasioned by the death of his wife.

After issue joined, the cause was removed from the Rock county circuit to the Jefferson county circuit, upon affidavit of prejudice in the judge of the former circuit.

Later than that, and on the fifteenth day of September, 1868, the plaintiff filed his sworn petition in the Jefferson county circuit, averring himself to be a citizen of the State of Illinois, and that the defendant was "a corporation duly organized under the laws of the State of Wisconsin," and praying the removal of the suit into the circuit court of the United States. (Folios 17 and 18.)

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view, the proviso must stand, and the purview be defeated.

The Attorney General *v.* Chelsea Water-Works, Fitz., 195.
Townsend *v.* Brown, 4 Zabriskie, 80.
Sedgwick on Statutes and Constitutional Law, 62.

The 1st section of the act of Congress of February, 1793, to promote the progress of the useful arts, prescribes a forfeiture against any one infringing a patent, and provides that the forfeiture "may be recovered in an action on the case founded on this act, in the circuit court of the United States, *or any other court having competent jurisdiction.*

1 Stats. at Large, 318.

The 17th section of the act of 1836 provides that suits under the patent laws shall be originally cognizable, as well in equity as at law, by the circuit courts of the United States, or any district court having the power and jurisdiction of a circuit court.

5 Stats. at Large, 117.

Under both these statutes it has been held, that the federal courts have exclusive jurisdiction, and the State courts no jurisdiction.

Parsons *v.* Barnard, 7 John., 144.
Dudley *v.* Mayhew, 3 Cow., 14.
Elmer *v.* Pennel, 40 Me., 434.
Rich *v.* Hotchkiss, 16 Conn., 414.
Parkhurst *v.* Kinsman, 2 Halst., 600.

Such was the opinion of Chief Justice Kent, as expressed in Livingston *v.* Van Ingen, (9 John., 582.)

See Curtis's Comm. on Const., sec. 134 to 141 inclusive.
Kent's Comm., vol. 1, Lec. 18, p. 400.

Second. But, if it was a civil suit, it was not one arising

under the laws or treaties of the United States. It did not affect ambassadors, ministers, or consuls. It was not of admiralty or maritime jurisdiction. The United States were not a party, nor was any State a party. It was, therefore, clearly excluded from federal cognizance, unless it was a controversy between citizens of different States. That it was not. The plaintiff was a citizen of Illinois. The defendant was a corporation, chartered by that State; and, if a citizen at all, was a citizen of that State.

Bank United States *v.* Deveraux *et al.*, 5 Cranch, 61.

The Louisville, Cincinnati, and Charleston R. R. Co. *v.* Letson, 2 How., 497.

Marshall *v.* Baltimore and Ohio R. R. Co., 16 How., 314.

Covington Drawbridge Co. *v.* Shepherd *et als.*, 20 How., 227.

Ohio and Mississippi R. R. Co. *v.* Wheeler, 1 Black, 286.

The County of Alleghany *v.* Railway Co., 51 Penn. State Rep., 228.

We conclude, therefore, that the circuit court had no lawful authority to try the issue at all. And we submit that the court erred fatally on the trial of it.

First. The court erred in the instructions given and the instructions refused to the jury, upon the law limiting the plaintiff's right to recover.

The court charged the jury as follows:

[Folio 102.] "Another fact, in determining the question of negligence, perhaps, on the part of the defendant, should not be lost sight of, and that is the character of the weather at the time, and the direction the wind was blowing and its violence. It was blowing from Academy street towards the train, as it was coming dawn, and not from the train towards Academy street, That was a circumstance—it was a violent wind, such as was calculated to affect the sound of the approaching train, or of the bell—which should have induced to increased watchfulness on the part of those having the management of the train."

And again:

[Folio 103.] "To say that, under all circumstances and on all occasions, it is the duty of a person so crossing a railroad-track upon a public street to stop and take a look up and down the track deliberately, is not what the court can say is a rule of law."

And again:

[Folio 104.] "If it was their duty to look up and down after the freight train had passed, did they see the switch train? We do not know; and if they saw it—if they glanced round, as perhaps would be ordinarily true, or might be, of persons in crossing—a mere glance, not a fixed look, and saw the engine, what was the inference? We do not know. We cannot tell whether they saw it, or what conclusion they may have drawn if seen—whether they supposed it was moving or standing still, moving one way or another."

And again:

[Folio 104.] "It is certain, if they saw it, that it was their duty to try and avoid contact with it; * * that is to say, if, from what they saw, they could infer the train was about to cross Academy street. Of course, a different rule might follow if they supposed the train was standing still, or was moving in the opposite direction. They are to be judged by the impression made upon their minds at the time."

And again:

[Folio 104.] "It might have modified the rule, and undoubtedly did modify the rule of conduct applicable to the various parties, and, as I have already said, conducing, on the part of those having the management of the switch train, to greater watchfulness, to a stronger necessity of ringing the bell, because the movement of the freight train would naturally create more or less noise, and consequently a greater necessity of giving the proper warning of the approach of the switch train to Academy street; also, perhaps, it should have had its influence upon those who were standing at the crossing."

And again:

[Folio 105.] "I think you ought to bear in mind also, as having some weight upon your conclusions upon this subject, the fact that the person killed was a woman; that Mr.

Rice, the witness, who has testified before you, was also waiting, and passed on."

And again:

[Folio 105.] "The bell should be rung—for instance, the switch train was approaching Academy street—the bell should be rung in sufficient time, before the train reached Academy street, to give warning to any persons who might be wishing to cross the track at Academy street, and should be kept ringing up to the time that the tender reached the street, and I think until the tender crossed the street."

The court refused to charge, when asked by the defendants, as follows:

[P. 60, 7 Inst.] "Under ordinary circumstances, a person possessing the use of those faculties should use both eyes and ears to avoid injury in crossing a railway track; and if in this case the wind and noise of the freight train tended to prevent Mrs. Whiton from hearing the approach of defendant's engine, she was under the greater obligation to use her eyes. It was her duty to look carefully along the tracks of defendant's railway, both northwardly and southerly, before attempting to cross them; and it was not a sufficient excuse for failing to do so that the day was cold and windy, or that one train had just passed on the track nearer to her."

Butterfield *v.* Railway Co., 10 Allen, Mass. R., 532.
Railway Co. *v.* Heileman, 49 Penn., 60.
Railway Co. *v.* Coyle, 55 Penn. State R., 369.
Railway Co. *v.* Still, 19 Ill., 499.
Railway Co. *v.* Evans, 53 Penn. State R., 250.
Haring *v.* Railway Co., 13 Barb. Sup. Court R., 9.
Sheffield *et al. v.* Railway Co., 21 Barb., 339.
Brooks *v.* Railway Co., 25 Barb., 600.
Steves *v.* Railway Co., 18 N. Y., 422.
Railway Co. *v.* Buckner, 28 Ill., 299.
Roth *v.* Railway Co., 21 Wis., 256.
Railway Co. *v.* McKean, 40 Ill., 219.
Harty *v.* Railway Co., 42 N. Y., 468.

SECOND. The court erred in refusing the fifth instruction

UNITED STATES SUPREME COURT.

THE CHICAGO & NORTHWESTERN RAILWAY CO.,
PLAINTIFF IN ERROR,
vs.
HENRY K. WHITON, *Adm'r, &c.*,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

BY J. A. SLEEPER.

UNITED STATES SUPREME COURT.

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BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

About 11 o'clock on the morning of the 23d of December, 1864, the deceased, together with a Mrs. Woodward, and the witness Rice, stood on the cross-walk on the northerly side of the railroad tracks, where they intersect Academy street, in Janesville, waiting for a moving freight train on the main track of the M. & P. du C. R. R. to pass eastwards, so that they might proceed southward down the street and over the tracks. At the place where the deceased stood, there were, crossing Academy street, four parallel railroad tracks lying near each other, the two northerly ones belonging to the M. & P. du C.

R. R., and the others to the C. & N. W. R. R. the defendant. The morning was intensely cold, and a very strong wind blew up the track from a south-westerly direction.

So soon as the freight train passed by, Mr. Rice stepped briskly forward and got safely over the tracks, and in so doing neither saw nor heard any engine on the tracks of the C. & N. W. R.R. But after going a few feet south of the tracks, his attention was arrested by a scream, and on looking back. he saw that a locomotive of the defendant, which had been backing down westerly on its southerly track, drawing a single freight car, had passed over the deceased and Mrs. Woodward. On going to the assistance of the ladies, he observed that the persons on the engine were unconscious of the injury they had occasioned, and the engine was still proceeding down the track, but by his gesticulations, he succeeded in calling the attention of some one on the engine to the disaster, when the engine was stopped. No witness saw the engine run over the deceased, or noticed her conduct after Rice started to cross the track.

So much is undisputed. Rice is positive that no bell was rung or whistle sounded as the engine backed down over the crossing, and his testimony is corroborated by all the other witnesses; so that for the purposes of this argument we have a right to assume that neither of these precautions was observed by those on the engine; moreover we submit, with entire confidence, that the whole testimony, taken together, estabishes the grossest carelessness and indifference to consequences on the part of those controlling the engine. As they well knew, a long train was moving in an opposite direction, on a parallel track of the M. & P. DuC. R. R., but a few feet distant from

them, obscuring their own cars from the view of those on the opposite side of the long train, and they could not have failed to know, that in all probability, persons had been waiting at this much frequented crossing on the northerly side of the tracks for that long train to pass, in order that they might proceed southward over the crossing, and that it was impossible that such persons could see the engine in their charge, backing down over the street. Yet without blowing a whistle, or ringing a bell, or looking out of the cab to the north, or keeping the switchman in his place on the step, on the end of the tender, or using the slightest other care to prevent accident, the engine was driven over the crossing just in time to meet persons who had been waiting to advance so soon as the freight train on the other track should leave the crossing; and so these reckless persons continued to let their engine run on a considerable distance after the deceased was struck down until Rice succeeded in stopping them by signals of disaster. The statutes of Wisconsin require a bell on locomotives to be rung at all street crossings in incorporated cities like Janesville.

R. S. of Wis. 1858, *Ch.* 79, § 41, 42.

I.

The first point to be decided is, whether the Court below rightfully obtained jurisdiction of the case.

The action was originally brought in the year 1866, in a State Court of Wisconsin, to recover damages by reason of the negligent destruction of the life of the wife of the defendant in error, under a statute similar to the English Statute known as Lord Campbell's Act, which has been in substance adopted in most of the States.

The Wisconsin Act contains this provision—

"Such action shall be brought for a death caused in this State, and in some Court established by the Constitution and laws of the same."

After the action had been pending some time in the State Court, the Act of Congress of March 2, 1867, providing for the removal of causes from State Courts into the Federal Courts, under certain circumstances, was passed, and the plaintiff below availed himself of the privilege afforded by this Statute, and removed the cause for trial into the Circuit Court U. S. for the District of Wisconsin.

It is not denied that the proceedings to remove the cause were regular, but it is insisted that the cause was one not capable of removal, so as to confer jurisdiction on the Federal Court.

We understand that the following points will be urged as conclusive against the right of a Federal Court to take jurisdiction of this cause:

1. Because all acts for the removal of causes from the State Courts into the Federal Courts, are unconstitutional and invalid—and especially the Act of 1867.

2. The citizenship of the parties to the record does not permit the Federal Court to take jurisdiction.

3. The Statute of Wisconsin, under which the action was brought, in furnishing a new remedy, might properly limit its enforcement to the Courts of that State, and in fact so did in express terms in the proviso quoted above. This point is in effect a denial that the Federal Court for the District of Wis. could get jurisdiction of the *subject matter*.

1. As to the *first point*, there does not seem to be room for argument. The 2d section of the 3d article of the Constitution of the U. S. provides that the judicial power of the Courts of the U. S. shall extend to *controversies* between the citizens of different States.

Under this grant of power, Congress has repeatedly provided by statutes, for the removal of controversies between citizens of different States from State Courts to the Federal Courts, as in 1789, 1816, 1833, 1862, 1866 and 1867. The power has at times been questioned, but has uniformly been sustained.

For a discussion upon Statutes later than the original act of 1789, see *Avranches vs. Schell*, 4 *Blatch.* 256, on the Act of 1833, which provided for the removel of the suit *at any time before trial*, like the Act of 1867. See also a discussion of the Act of 1863, in *Hodgson vs. Milward*, 3 *Grants, Pa. Repts.* 418. 5 *Phila. Repts.* 243, 302, 308. If the *parties* and *subject matter* are such that the Court can take cognizance, it is plainly competent for Congress to provide for the removal of suits so long as they are *controversies*, that is, before an actual *trial* by a competent Court.

A point is made upon the omission of the word "all," in that clause of the constitution which confers jurisdiction upon the U. S. Courts over *controversies* between citizens of different states. The reason, as given by Story, (*Constitution* § 1742) is "to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate." The jurisdiction extends not to *some* controversies, but to controversies *generally*; and Congress has the undoubted power, in its discretion, to extend the jurisdiction to *every* controversy and for the purposes of removal, it did extend such jurisdic-

tion to *all* controversies between citizens of different states, by the act of 1867. At the time Conkling wrote, Congress had not exercised its full power on the subject of removals, and hence he laid down the rule that no suit could be removed, which could not be brought in the Federal Courts, for, says he "it is obvious *from the language of the 12th Section of the Judicial act, that it was not intended by it to extend the jurisdiction of these Courts over causes brought before them on* removal, *beyond the limits prescribed to their original jurisdiction.*" But by the act of 1867, an intention was expressed to *extend* the right of removal beyond the limits fixed by the act of 1789, and to cover the exact case at bar, which was pending in a state court when the act of 1867 was passed.

Mayor vs. Wallace, 6 *Wall*, 247.

2. The next question is as to whether the parties to this suit possess the requisite *citizenship* to give this Court jurisdiction, Whiton, the Adm'r, being a citizen of Illinois, and the plaintiff in error a corporation of Wisconsin.

This question is fully settled in our favor by the following authorities:

Coal Co. vs. Blatchford, 11 *Wall*, 172, 215.
Dodge vs. Perkins, 4 *Mason*, 435.
Childress, Ex'r vs. Emory's Exrs, 8 *Wheat*, 642.
Conkling's Treat, 161.
O. & M. R.R. Co. vs. Wheeler, 1 *Black*, 29.
Quigley vs. P. W. & B. R.R. Co. 21 *How.* 202.
Marshall vs. B. & O. R.R. Co. 16 *Id* 314.
Wood, Adm'r vs. Gold, 4 *McLean*, 577.

But as the declaration in this case averred the necessary citizenship to give jurisdiction, the defendant could only avail

itself of a defect in citizenship, by *a plea in abatement.* Such a plea was filed, and a demurrer thereto being sustained, it pleaded to the merits.

This was a waiver of any objection to the competency of the parties to litigate in the Federal Court.

Sheppard vs. Graves, 14 *How.* 505, 512.
Jones vs. League, 18 *do* 76.
Bell vs. R. R. Co., 4 *Wall.*, 598.

3. We now come to the question whether the *subject matter* of this suit is such that this court can take cognizance thereof.

The claim is made that inasmuch as the right to maintain this action did not exist at common law, it rests upon a statute of Wisconsin, which limits the special right conferred to its pursuit in the particular courts mentioned in the statute. To aid the argument on this point it is called a *special proceeding* to obtain damages, and is likened to the case of a special remedy pointed out by statute for obtaining damages from a railway company, which appropriates ones land for its roadway, or to proceedings to enforce statutes of a state of a penal character. While it is not always easy to say that a particular remedy provided by statute is in exclusion of any other, or only cumulative, yet in the case at bar we admit that the right of action exists only by the statute; and yet the general right applicable to all persons having been created, that right may be asserted in any court of competent jurisdiction.

This court has nothing to do with the penal statutes of Wisconsin, but its statutes which govern questions of property are administered in the Federal as in the state courts.

The statutes of Wisconsin provide for statutory foreclosures, partitions, and ejectments, and declare that proceedings under them shall be brought in the State Circuit Courts, but it was never pretended that the local federal court had not authority to administer the same statutes. In the case of proceedings to condemn land for railway purposes, it has generally been held that the particular preliminary proceedings pointed out by state statutes must be followed; but suppose after commissioners appointed by a state judge had made a report as to the damages sustained by a non-resident, that non-resident should then appeal to the State Circuit Court, would there then not be a *controversy* which he might remove to the United States Circuit Court for trial?

Again, state statutes declare that foreclosures, partitions and ejectments shall be brought in the *County* where the land to be affected lies. Do such statutes prevent the non-resident from bringing his suits out of the County, when he sees fit to sue in a Federal Court.

The question whether the Federal court can take jurisdiction is settled when it is ascertained that the statute under which the right of action arises, establishes a *general rule* as to property rights, applicable throughout the State; and it makes no difference that such rights had no existence at common law.

The great majority of questions which the Federal courts are called upon to decide, arise upon state statutes which profess to confer jurisdiction to decide them solely upon the state courts, and which are not merely declaratory of the common law.

In view of these general considerations, let us examine the particular statute in question:

It differs from the Illinois statute upon which the action was brought in *Barrons' case*, 5 *Wall*, 90, only in the proviso that "such action shall be brought for a death caused in this state, and in some courts established by the constitution and laws of the same.

In Barron's case, the Vermont Ex'r was allowed to sue in the *Circuit Court U. S. N. D. Illinois*, in which district the death occurred. The *Sup. Ct. U. S.* assumed that the statute upon which the suit was brought is general, and that the rights conferred may be enforced in the Federal Courts. And now, do the words which we have cited from the Wisconsin statute, so restrict the mode in which the new right may be enforced that the Federal Court cannot possibly acquire jurisdiction of a case arising under it? The language "the action shall be brought for a death caused in this State," is of no importance, as such would be the rule without this language.

Whilford vs. Panama R.R. Co. 23 *N. Y.* 403.
Needham's adm'r vs. G.T.R.R Co. 38 *Vt.* 294.

So we have only to consider the words, "in some Court established by the Constitution and laws of this State." Now we say that this latter clause is of no consequence in settling the question at issue; for without it the inference would be that the action should be brought, like all other actions, in courts established by the constitution and laws of the state. There is no case where the statutes of Wisconsin attempt to confer jurisdiction upon any other courts than the courts of Wisconsin; and when a general rule of personal or property rights is laid down in those statutes, then if a *controversy* arises upon those statutes, this Court assumes jurisdiction if the amount involved is sufficient, and the parties have the requisite citizenship.

The words of the statute in question relate *only to the bringing of the suit, and not to its trial*, and are *permissive* as to the State Courts, and not *prohibitory* as to the Federal Courts.

It is not even declared that the action shall be brought in the *county* where the death is caused, and in this respect the action is less *local* in its character than actions under many of the State statutes, as foreclosures, partitions and ejectments.

In framing the proviso in question, the Legislature intended to affirm a principle which had at times been disputed, to-wit: that an action should not be maintained for a death caused outside of the limits of the State, and then, *in favor of the individual or corporation*, to further provide that such individual or corporation causing the death should not be liable to an action in any Court outside of the State. One proposition is the converse of the other; and the result aimed at is, that the action shall be for an injury local to the State, and be brought in courts of the State; though it is true that under the current of decisions, this result would have followed, without the proviso.

But we deny that it is competent for a legislature, after establishing a general rule of liability to be enforced as in ordinary cases by trials before courts and juries, and under which actions may accrue equally to the resident and the non-resident to declare, after the *controversy* is pending in one of the courts of the State, that the non-resident shall not remove the cause growing out of the Statute, into a U. S. Court for trial.

For instance, there is a statute in Wisconsin allowing a remedy to the holder of a tax title to proceed to foreclose by an equitable action, the patentee; and it is declared that such action shall be brought in the Circuit Court of the county

where the land lies. Now, suppose that statute had further declared that if the defendant happened to be a non-resident, he should not be entitled to remove the cause for trial into this court. Would this court be bound by such a provision? Clearly not, and because a controversy has arisen which the Act of Congress, authorized by the Constitution, declares may be removed, and a State Statute cannot repeal an Act of Congress. The case of *Parker vs. Overman*, 18 *How.* 137 was a special proceeding in the State Court to confirm a tax title, but it was held removable.

This action is not in the nature of a *criminal* proceeding, as was the case in *State of Pa vs. Cobbett*, 3 *Dallas*, 467, where an action upon a recognizance was held not removable; but is simply and solely an action for the pecuniary damages which the relatives of the deceased have sustained, and no more than $5000 can be recovered. A controversy has arisen as to the amount of these damages between a citizen of Illinois and a citizen of Wisconsin.

But suppose when the Wisconsin act under consideration was passed in 1858, it had expressly declared that Federal Courts should not have jnrisdiction of a suit brought under it, and subsequently, in the Congress of the U. S., composed of representatives from Wisconsin and other States, in 1867, it is enacted, under the sanction of the Constitution, that a *pending suit* under that act of Wisconsin, between a citizen of Wisconsin and a citizen of any other State, in which more than $500 are involved, *may be removed.* Is it not clear that the act of Congress must have effect, uotwithstanding the previous prohibition of the Legislature?

To hold otherwise, would enable the State Legislatures to withdraw every subject of litigation, at will, from the Federal Courts.

Such a rule did not exist even under the act of 1789.

In *Barney vs. Globe Bank*, 2 *Am. Law Reg'r*, 221, a case under the act of 1789, Judge Silliman says: "The principle contended for in the 2d proposition, viz: that no case can be removed from a state court to the Circuit Court U. S. unless it could have been originally brought there, *is not of universal application.*" In that case Barney, a citizen of the Southern Dist. N. Y. sued the Globe Bank, a citizen of Mass., by attachment in a *state court.* The Globe Bank appealed and removed the cause to the Circuit Court of the United States, although Barney could not have sued there from inability to get service of the summons.

A similar question was considered under the act of 1789 in the case of *Parsons vs. Lyman*, 32 *Conn.*, 574, where the statutes of Connecticut gave the probate court exclusive jurisdiction over the accounts of executors as trustees under the will. The district Judge of the United States Court, says; "But if it be assumed that the requirement of the Act of 1853, compelling trustees to file their annual accounts in their Court of probate draws after it the power enabling that court to settle them, we apprehend that so far as controveries between citizens of another State, and trustees who are citizens of this State arising on those accounts are concerned, such jurisdiction of the court of probate would only be concurrent with that of this court. If the jurisdiction of the Probate Court is made *exclusive*, by the Statutes of this State, as against the other State tribunals, it *by no means follows that it is exclusive against this court.*"

"Though the jurisdiction of all matters properly cognizable by courts of chancery, were confined by the law of the

state to the Court of Probate, or any other tribunal, the equitable jurisdiction of this Court would remain untouched."

An examination of the cases will show that where it has been held that a remedy was to be sought only in a particular forum, the statute conferring the remedy related to *special proceedings* unknown to the common law, where a new remedy was to be sought in a particular manner, by a special class of persons, and not to cases where a general right of action was conferred. Thus, *Almy vs. Jackson* 5 *Johnson* 175, was upon a statute to protect ferries from disturbance, and in the nature of a police regulation. And a like case is *Conkling vs. Baldwin*, 4 *Wend.* 667. *People vs. Hazard*, 4 *Hill*, 209, was upon the state militia law, which pointed out a particular mode of collecting fines; and *Dudley vs. Mayhew*, 3 *Coms.* 9, simply decides that the United States Courts have exclusive jurisdiction in *P*atent cases. The United States Courts, it is well understood, have nothing to do with the municipal regulations of a state, its police and military regulations, or special proceedings under statutes strictly local in their character. But when the subject of litigation is one of general jurisdiction, cognizable in the courts of record of the state, if a non-resident is interested and the amount in controversy is sufficient, he has a right to remove the suit under the act of 1867, at any time before trial, into the *United States Court.*

That a cause of action, under the act of the legislature we are considering, is of the latter description, must be admitted from the decision of *this Court*, in Barron's case already cited.

But if we were to concede that the remedy of the non-resident, under the act in question, was intended to be limited to

an action brought in a State Court, and that it was competent for the legislature so to limit the remedy; still it would not follow, when the action had been *brought* in the manner pointed out by the statute, that such action might not be removed *for trial* into the U.S. C'rt. It cannot be complained that we were not regular in bringing the action in the State Court, and after it was removed to the U. S. Court it was still the same action, to be tried in the same manner, upon the same evidence, and with the same result, as if the case had remained in the State Court.

The views we have endeavored to sustain, will be found to be supported by numerous decisions in the *Supreme Ct. U. S.*

In the *Union Bank Tenn. vs. Jolly's Ex'rs*, 18 *How.* 593, the court declare that "the law of a state, limiting the remedies of its citizens in its own courts, cannot be applied to prevent the citizens of other states from sueing in the courts of the *United States*, in that State, for the recovery of any property or money, to which they may be legally or equitably entitled."

To the same effect is *Suydam vs. Brodnax*, 14 *Pet.*, 67.

In *Hyde vs. Stone*, 20 *How.*, 170, the court say; "the jurisdiction of the courts of the United States over controversies between citizens, of different States, cannot be impaired by the laws of the states, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power."

See also *Barber vs. Barber*, 21 *How*, 582. As Judge McLean said in *Strachan vs. Clyburn*, 3 *McL.* 174, "this court, under various acts of Congress and by virtue of its own rules, adopts the remedies authorized in the State Courts *though they may be local and peculiar in each State.*"

To the same effect is *Weston vs. Charleston*, 2 *Peters*, 449 where a proceeding by writ of prohibition from the state court, was held reviewable in the Supreme Court U. S.

In the late case of *Cowles vs. Mercer Co.* 7 *Wall*, 118, we understand that the right of the Federal Court for Wisconsin to take jurisdicton of the subject matter of this litigation is in principle fully affirmed.

The question may be fairly tested in this way. The act in question applies equally to individuals and corporations. Suppose a nonresident, in passing through Wisconsin.should occasion the death of a party, and the administrator of the deceased party, living in the state, should bring an action under this statue, in the State Court, against the nonresident, averring that the death was caused by negligence on the part of the non-resident; could not the latter, at the time of entering his appearance, remove the suit into this court, under the act of 1789, or the later act of 1867.?

And if this be true, does it not follow that theie is nothing in the nature or subject matter of this suit, where a nonresident has sued a resident, which precludes the jurisdiction of this court?

But in this case the objection that the Court could not take jurisdiction of the subject matter of the litigation was raised by plea in abatement, which the defendant abandoned and pleaded to the merits. Under such circumstances, this Court will disregard the point, unless the Court below was bound to arrest the judgment, on the ground that no cause of action appeared on face of the declaration.

In other words, if under *any possible view of the case*,

the Federal Court could properly adjudicate upon the subject matter, the plea to the merits was a waiver of the point made by the plea in abatement, even though the plea in abatement might properly have been sustained.

It will also be noticed that *no exception* was taken to the order of the Court below, denying the motion to remand the cause to the State Court, or in sustaining the demurrer to the plea to the jurisdiction of the Federal Court. (Printed transcript of record, pages 29 & 32.) And when the cause came on for trial, a second motion to remand the cause to the State Court was made, and overruled, and no exception taken, (ibid 33). The bill of exceptions shows (ibid 48) that after the jury were empanelled, a motion was made by the attorneys of the R. R. Co. that the plaintiff should be precluded from offering any evidence, on the ground that no cause of action was set forth in the declaration, and when this motion which had in effect been decided three times before without objection on the part of the Railroad Company was overruled, an exception was taken.

In concluding what we have to say upon this branch of our argument we ask the careful attention of the Court to the reasoning of Chief Justice Dixon in his dissenting opinion in this case, 25 *Wis Repts.* 435.

II.

It being settled that the Court below had jurisdiction of the case, we are next to examine the record, for any alleged errors in its rulings at or after the trial, or in its charge to the

jury, bearing in mind that, under the 22d Sec. of the Judiciary Act, a reversal cannot be had for *any error of fact*—

Smith vs. Sac Co., 11 *Wall.* 160.
Suydam vs. Williamson, 20 *How.* 427.

Or for overruling a motion for a new trial, (*Freeborn vs. Smith* 2 *Wall.* 169), and that every reasonable intendment will be indulged in favor of the judgment below.

Ventriss vs. Smith, 10 *Peters* 161.
Hepburn vs. Dubois, 12 *do* 345.
Coffee vs. Planters' Bank, 13 *How.* 183.
Newell vs. Norton, 3 *Wall.* 257.

We cannot bring ourselves seriously to argue the propriety of the rulings of the Circuit Judge, who presided on the trial below, on the admissibility of evidence, knowing that in Federal Courts a liberal rule has always obtained in admitting any evidence that may tend to establish the truth of a matter of fact in dispute, where the best available evidence is offered, and the testimony is not mere matter of opinion or hearsay.

Schuchardt vs. Allens, 1 *Wall.*, 359.
Ins. Co. vs. Weide, 11 *do* 438.

We fail to see wherein there is any ground for a claim that the plaintiff in error was in any way prejudiced by the admission of evidence offered by the plaintiff below, or the exclusion of evidence offered by the defendant below.

But it is said: grant there was no error in the rulings upon the trial, yet when the whole evidence was before the Court, it

was apparent that the deceased lost her life by her own negligence, and therefore the Court below should have instructed the jury that upon the whole case there was no evidence to sustain a verdict for the plaintiff.

We suppose that it will not be contended that the evidence on the trial did not disclose negligence (and we claim of the grossest sort), on the part of the employees of the railroad Company, who had charge of the engine which ran over the deceased.

We shall not comment on this evidence, satisfied that a brief examination of it can lead but to one conclusion.

But we invite attention to the following cases where acts of similar negligence have been commented upon:

Johnson vs. R. R. Co. 6 *Duer* 633, & 20 *N. Y.* 65.
Ernst vs. R. R. Co., 35 *N. Y.*; 9.
Renwick vs. R. R. Co. 36 *do* 132.
Beers vs. R. R. Co., 19 *Conn.* 566.
Fero vs. R. R. Co., 22 *N. Y.*, 509.
Bradley vs. R.R. Co. 2 *Cush.*, 539.
Linfield vs. R.R. Co. 10 *do* 562.

But it is claimed that the evidence shows that the deceased was also in some degree negligent, and that it is a settled rule of law that if the injured party is chargeable with any negligence at the time of the injury, there can be no recovery for the same.

III.

This opens up the much mooted question of *contributory negligence.* We shall not attempt a labored review of the numerous decisions in which, of late years, and particularly in the case of railway injuries, this doctrine of contributory negligence has been elaborately discussed. The cases cannot be altogether harmonized, but generally agree in holding that the injured party must not have been chargeable with negligence contributing directly to the disaster; but the great difficulty is to deside when a party may be said to have contributed by his own carelessness to the result.

In a late Irish case cited in the notes to 2 *Shelford on Railway.* (English Ed'n), the true distinction, as it seems to us in questions of contributory negligence, is stated in substance thus:

1. The party complained of must have been negligent.

2. The party for whose injury the suit is brought must not have been guilty of negligence to a degree directly contributing to the disaster.

3. But notwithstanding the injured party may have been careless to a certain extent, yet if the party inflicting the injury might, by the exercise of ordinary care, have avoided so doing, then he shall be liable; and the injured party shall not be precluded from a recovery on the ground that his own negligence contributed to the disaster.

The limitation placed upon the rule as to contributory negligence, by this 3d proposition, is manifestly founded in

reason, for to reject it would be to hold that one man might wantonly kill another, and not be liable in damages under the statute in question, if he could only show that the deceased was by reason of drunkenness or recklessness, chargeable with negligence in not escaping the injury.

This rule is expressly approved by Judge Redfield—

2 *Law of Railways*, 236, 223. (4th Ed'n).

Suppose in the case at bar, the jury had believed that the deceased was in some degree careless, might they not have reasonably considered that notwithstanding such carelessness if the railway employees in charge of the engine had used ordinary care in its management, the life of the deceased would not have been sacrificed.

But what evidence can be pointed to in the record tending to show the least degree of negligence on the part of the deceased? No one saw the fatal injury committed, but the jury were asked to rack their inventions, and torture their wits to frame some theory which would imply negligence in the conduct of the deceased when the injury was committed.

It was urged before them with great vehemence that they were bound to infer that the deceased did not stop when she came to the track and look up and down the road to see if an engine was coming for it was said if she had done so she would not have been injured.

The rule sought to be sustained by this argument, would make it impossible ever to recover for damage under the statute in question occasioned by a railway train, for if a party is bound at his peril before crossing a street intersected by a rail-

way in a populous town to make careful observations up and down the railway track, the result would be to release the railway companies from all requirements of care on their part, for they could always show that notwithstanding the grossest recklessness on the part of their employees if the injured party had with cautious deliberation reconnoitered the track in every direction, he would not have been hurt. No such unreasonable rule will ever be enforced by an intelligent Court.

But who knows that the deceased did not use the very precaution which it is gratuitously assumed she did not? It is by no means improbable that she lost her life by reason of her attempt to look up and down the track. We know from the testimony of the witness Rice, that he, starting immediately before the deceased, did not stop to look up and down the track, and neither saw nor heard any engine, but got safely over, and some three rods beyond the track. when he heard a scream. What caused Rice to be at such a distance ahead of the deceased at ths time of the fatal injury? It is not unreasonable to suppose that she had stopped and endeavored to see whether the track was clear. But in the driving snow, mingled with the smoke and steam from the passing engines, on that bitter cold morning, it is almost certain that she failed to see the engine which ran over her, or if she did, concluded as it was headed east, and no signals were sounding, that it had crossed the street going eastward, when in reality it was backing down over the street westward. The position of the engine, and the silence of the usual signals given at street crossings, was in effect a notificatiou to the deceased that she might cross the track.

Commonwealth vs. R.R. Co., 10 *Allen*, 191.

The situation called for extraordinary care on the part of those in charge of the engine.

Edsall vs. Vanderwork, 39 *Barb.* 589.
State vs. R. R. Co. 24 *Md.*, 84.
Wilson vs. Cunningham, 3 *Cal.* 241.
Taylor vs. Briggs, 28 *Vt.* 180.

But suppose at the critical moment when a clear view may have revealed the fact that the engine while apparently going eastward was with its low wheels concealed by the snow, really backing westward; that a cloud of smoke or steam had enveloped the deceased or the fierce blasts had blown her clothing over her face and caused her to stagger, or the heap of snow shovelled up from the track had caused her to slip, or even if she had been for a moment paralized at the sudden noiseless apparition of the engine was she, a woman inexperienced in such emergencies, chargeable with negligence because she did not do what the event showed she ought to have done to save her life.

Upon reason and authority, we say no.

The Amethyst Davies 20.
Stokes vs, Saltonstall, 13 *Peters* 181,
Eldridge vs. R. R. Co. 1 *Sandf. S. C.* 89.
Chapin vs. Hawes 3 *C. & Payne* 554.
Warren vs. R. R. Co. 8 *Allen* 227.

If a man is found killed on a railway track there is no presumption that he lost his life by his own carelessness, neither is there, without proof, any presumption of negligence on the part of the employees of the R. R. Co., but if positive proof of such negligence is produced, then the *prima facie*

case made will not be defeated by vague surmises without evidence that probably the deceased saw the advancing train, and might with due care have avoided injury.

R. R. Co. vs. Hunter, 11 *Wis.* 160.
Holbrook vs. R. R. Co., 2 *Kernan* 242.
Johnson vs. R.R. Co. 20 *N. Y.* 65.

What amounts to negligence under the special circumstances of each case; is so purely a question of fact for the jury that if their conclusion can be sustained upon any possible theory of the evidence, not purely fanciful, a Court will decline to disturb their verdict.

R. R. Co. vs. Grimes, 13 *Ill.*, 587.
R. R. Co. vs. Todd, 36 *do* 409.
R. R. Co. vs. Simmons, 38 *do* 242, 370, 482.
R. R. Co. vs. Hutchinson, 47 *do* 408.
R. R. Co. vs. Terhune, 50 *do* 151.
Trow vs. R. R. Co., 34 *Vt.*, 487.
Vinton vs. Schwab, 32 *do* 614.
McGrath vs. R. R. Co., 32 *Barb.* 144, 165.
Clarke vs. *Kirwan*, 4 *E. D. Smith*, 21.
Ireland vs. Plank Road Co., 3 *Kernan* 533.
Biesiegel vs. R. R. Co., 34 *N. Y.* 622.
Stucke vs. R. R. Co., 9 *Wis.*, 202.
Langhoff vs. R. R. Co., 19 *do* 489, 604.
Dreher vs. Fitchburg, 22 *do* 675.
Isbell vs. R. R. Co., 27 *Conn.*, 393.
Kerwhacker vs. R. R. Co. 3 *Ohio* (*N.S.*) 172.
Illege & Goodwin, 5 *C. & P.* 190.
Davis vs. Mann, 10 *M. & W.* 546.

Where evidence seems equally balanced, it is for the jury to decide.

Patterson vs. Wallace, 1 *McQu. Ho. L'ds*, 748.
2 *Redfield Railways*, 231, 236 *n.* (*4th Ed'n*).

It is probable that no modern case in its repeated trials before able Courts, has furnished so thorough a discussion of the doctrine of contributory negligence, in all its bearings, as *Ernst vs, R. R. Co.*, 35 *N. Y.* 9.

On the whole, it seems to us that no fair-minded, intelligent can read the evidence adduced on the trial below, and not be satisfied that there was a clear case of liability on the part of the R. R. Co. established. But suppose the jury had erred in their estimate of the evidence; the only remedy would be by a motion for a *new trial*, and no relief could be furnished here because an exception was taken to the refusal of the Court to withdraw the case from the jury.

Schuchardt vs. Allens, 1 *Wall.*, 359.

IV.

If we have been so fortunate as to satisfy this Court that there was evidence on the trial below sufficient for the consideration of a jury, as tending to establish a liability on the part of the R. R. Co., and that the Court on that trial was not bound upon the request of the defendants counsel to charge the jury that there was no evidence upon which they could find a verdict against the defendant, then we suppose that the only real question in the case is disposed of, and that the judgment must be affirmed.

Chandler vs. Van Roeder, 24 *How.*, 224.

But as a multitude of special instructions to the jury were asked by the counsel for the R. R. Co. apparently for no other purpose than to entrap the Court by their refusal we shall con-

clude our argument by a brief reference to them. They will be found at pages 60 61 and 62 of the printed transcript of record.

The refusal of the Court to give these instructions was made the basis of a motion for new trial, and the opinion of the Court on the overruling of this motion is a complete vindication of its ruling, with respect to these instructions, (See the opinion at length on page 43 of the printed transcript of record, as well as the actual charge given by the Court at page 65.)

If the reason thus given by the Court for refusing the instructions asked by the defendant on the trial below do not commend themselves to the judgment of this Court then we should despair of adding to their weight by anything we might say.

Nice criticism is not to be resorted to, to show error in the instructions of a Court, *Rogers vs. Marshall* 1 *Wall*, 644, nor can a point be considered on error which was not specially brought to the attention of the Court below, *Coons vs. Gallagher* 15 *Peters* 187.

Nor are the comments of the Judge upon the evidence the subject of review on error, if it has been left to the jury to pass upon its effect.

Carver vs. Astor 4 *Peters*, 1.
Gaines vs. Dunn 14 *do.* 322.
Hyde vs. Boorden 16 *do.* 169.
Minor vs. Tillotson 2 *How.* 392.
Garrard vs. Reynolds, 4 *do* 123.
Russell vc. Ely 2 *Black* 575.

The charge as respects the rule of contributory negligence defeating a recovery was more favorable than the defendant was entitled to, in omitting the qualification that notwithstanding there might have been negligence on the part of the deceased, still the defendant was bound to use ordinary care not to destroy the lives of even negligent persons.

While the transcript of the record sent up here is loaded down with matters extraneous to the issues for decision at this bar, and so, obnoxious to repeated decisions of this Court, yet it serves to show the ingenious devices for delay which have enabled a powerful corporation to escape what we believe to be an unquestionable liability, *for seven years*, and to heap upon the plaintiff below, costs and expenses in the prosecution of this suit greater in amount than the entire judgment therein and we therefore feel fully warranted in asking that that judgment be affirmed, with costs and damages, under the 23d rule of this Court.

J. A. SLEEPER,

ATTY. OF DEFENDANT IN ERROR.